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CASES
ARGUED AND DETERMINED
IN THE
COURT
FOR THE
TRIAL OF IMPEACHMENTS
AND
CORRECTION OF ERRORS,
IN THE
STATE OF NEW-YORK.

BY GEORGE CAINES,
COUNSELLOR AT LAW, AND REPORTER TO THE STATE.

VOL. I.

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1805.

District of New-York, ss.

BE IT REMEMBERED, That on the eighteenth day of January, in the twenty-ninth year of the Independence of the United States of America, **GEORGE CAINES**, of the said District, hath deposited in this office the Title of a Book, the right whereof he claims as Author, in the words and figure following, to wit :

“ Cases argued and determined in the Court for the Trial of Impeachments
“ and Correction of Errors, in the State of New-York.

“ **BY GEORGE CAINES,**

“ Counsellor at Law, and Reporter to the State.

“ **VOL. I.**”

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EDWARD DUNSCOMB,

Clerk of the District of New-York.

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PREFACE.

THE Decisions now offered to the Public, are the Judgments of a Court of dernier resort, and of the highest importance. To be acquainted with determinations of inferior Tribunals, would be of scarcely any utility, if those of this were unknown. It is from hence we are to receive the Supreme Law of the land : for such its opinions may well be termed ; because, however our Legislature may enact and ordain, whatever is thus enacted and ordained, is here, in almost all cases, to be expounded and enforced. It is here that the worth of the adjudications of every other Court, is to be ascertained. It is in this mint they receive their stamp, and sterling value. The endeavours, therefore, of the Author, have been directed to collect as many of the antecedent Decisions of the Court of Errors (for, thank God ! it is not yet known as one for the trial of Impeachments) as he possibly could. Those now obtained will form an introductory part to the present number. So, what may be in future acquired, will precede the Reports of the year, and though this extension of the original plan will naturally demand an increase of price, the already experienced liberality of the Bar is, on this point, a sufficient guarantee that the Work will not on this account be the less acceptable. The Deter-

P R E F A C E.

minations now prefixed to the Cases reported by the Author, have been furnished by the kindness of THOMAS R. GOLD, Esq. and were adjudged while he was in the Senate. The opinions he read, are given as those of the Court, and, though expressed in his language, contain the principles on which the Cases were decided.

GEO. CAINES.

New-York, December, 1804.

The cases from 1 to 444 are abridged.

CASES

ARGUED AND DETERMINED

IN THE

Court for the Trial of Impeachments

AND

CORRECTION OF ERRORS,

IN THE STATE OF NEW-YORK;

FEBRUARY, 1801.

Herman Le Roy, William Bayard, }
and Gerritt Boon, } *Appellants,*

Against

Peter Servis, Peter Little, Samuel }
Runyions, James Warren, and } *Respondents.* *See 2 Case in Err.*
others, } *175.*

THE appellants filed their bill in chancery, stating, that in 1768, Peter Servis, and twenty-four others, presented to Sir Henry Moore, formerly governor of the province of New-York, a petition, praying him, for their use, to purchase from the Oneida Indians 25,000 acres of land, then in the county of Albany, but now in that of Herkimer, and to grant them letters patent for the same. That for money, or some other valuable consideration (not particularly known to the complainants) paid, delivered, or performed, by Sir William Johnson, formerly of the county of Tryon, deceased, and on consideration that he would pay all the office and other fees, on issuing the letters patent, the petitioners agreed with him, that, on their obtaining a grant for the said 25,000 acres, they would hold the same in trust for him, and duly convey

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Where there are several complainants to a bill praying an injunction, an affidavit by one alone, showing probable cause for equitable interposition, is sufficient; and a demurrer that all have not joined, is bad. Whether our courts will en-

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ertain a plea that a contract is illegal, because in contravention of the royal instructions respecting grants of land to patentees? 2y. A demurrer to a bill because seeking a discovery of that which would subject to the penalties of the act against buying pretended titles, is bad, unless it appear the answer would show a scienter of the seller's being out of possession, and a subsisting adverse possession. If a plaintiff be properly before the court of chancery for a discovery, he may pray relief, and a demurrer to the whole bill on that account, is bad.

the whole to him in fee. That in the year 1769, letters patent were issued for the above lands, in favour of the petitioners, the office and other fees whereof Sir William Johnson paid; upon which, the patentees did, for the considerations aforesaid, and in pursuance of their said agreement, by sufficient deeds in the law, grant, release, and convey the said 25,000 acres of land, to the said Sir William Johnson, in fee simple, by virtue of which, the said Sir William Johnson took possession thereof, caused the same to be surveyed, and trees to be marked in the boundary lines thereof. The bill then set forth a regular chain of title, from Sir William Johnson, for 23,000 acres; and also, that after the death of Sir William, and early in the war between the United States and Great-Britain, that Sir John Johnson, the son, and one of the executors of Sir William, had the custody of the conveyances from the patentees, and to guard against their loss, or for some other reason, buried them in the earth, by means whereof they were either wholly lost, or rendered illegible, and were therefore altogether out of the power of the complainants. That Peter Servis and the other defendants, endeavouring to avail themselves of the loss or destruction of those conveyances, and claiming title to the said lands, had brought actions of ejectment for them, wherefore they prayed a discovery, an injunction to stay proceedings in the several ejectment causes, that the complainants might be quieted in their possession, and that such other and further relief might be afforded, as was agreeable to equity and good conscience. To the bill was annexed an affidavit of the appellant, Gerritt Boon, swearing, that, according to his knowledge, information, and belief, the material facts charged were true, and that, according to his information and belief, the deed or deeds from the patentees to Sir William Johnson, was, or were lost or destroyed, as in the bill was set forth. To this some of the defendants demurred, and assigned for reasons, 1st, That the complainants ought to have made affidavit, that they had not in their power or custody the deed or deeds, concerning which they seek a discovery, and for the loss whereof they pray relief. 2d, That the agreement between Sir William Johnson and the patentees, as set forth in the bill, was illegal, and not entitled to the aid of a court of equity. 3d, That the bill charged, that the defendants claimed by conveyances

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▼

executed by persons out of possession, and that a discovery of that fact would subject the defendants to a penalty. 4th, That the complainants prayed a discovery of the defendants' title, and to be quieted in possession, before the title of the complainants was established at law. 5th, That the title of the complainants, as set forth in the bill, was merely triable at law, where it might be fully ascertained and established, if it was as stated to be. Lastly, That the bill contained no equity. These, they contended, were good reasons for demurrer. 1st, Because, where it is intended to obtain any specific relief, upon the loss of a particular deed, and thereby give to chancery a jurisdiction, to which it would not otherwise be entitled, in exclusion of the common law; it becomes necessary that the party complainant should annex a satisfactory affidavit to his bill, to inform the court of the loss he complains of, and the necessity of equitable interference. 2d, That such affidavit ought, in the present case, to have been made in different terms, or by all the complainants. Gerritt Boon *may have been informed, and may verily believe, and may hope to be able to prove*, as he states in his affidavit, that the petitioners named in the bill of complaint, did respectively convey all their right, title, and interest, to Sir William Johnson, and may also *have been informed, and verily believe*, that the deeds were destroyed, as alleged; yet the other plaintiffs may not believe any such matter, and may actually have evidence to the contrary, or possess the deeds about which they were inquiring. 3d, That there was not any necessity for changing the jurisdiction from law to equity; for the complainants, if the aid of chancery was wanted for discovery *only*, might have the benefit of it on a bill confined to that object. 4th, That the title of the complainants, if any, was a legal title, and that, if Gerritt Boon were able to prove (as he swears he hopes to do) the conveyances to Sir William Johnson, even a discovery would not be wanted. 5th, That if any one of these reasons is good cause of demurrer, the cause must be regularly out of court.

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The Chancellor having allowed all the demurrers respectively, and ordered the complainants' bill to be dismissed with costs, as to the demurrants, the cause now came before the court, on an appeal from that decision. After hearing argument, the court resolved, 1st, As to the first point, that the

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authority of precedent was wanting to give it sanction, no sufficient reasons having been assigned, to induce the court to sustain it; that on the contrary, considerations, resulting from inconvenience in all, and utter impossibility in many cases, afforded just grounds for repelling the exception. 2d, That it is considered, no decree on the merits of the complainants' case is ever made on the evidence contained in the affidavit annexed to the bill; but that as such affidavit is merely to present probable or colourable grounds, for chancery interference and examination, there could be no hesitation in saying, that the affidavit of Gerritt Boon was sufficient in terms for *that* purpose; and that the exception taken to it must be disallowed. 3d, On the second cause of demurrer, objecting illegality to the alleged agreement between Sir William Johnson and the original patentees, in contravening the salutary principles upon which the instructions of the royal government, regulating colonial grants, were grounded, it is sufficient to say, it has been justly admitted, that this is highly delicate ground; and that the principles of this objection, if allowed, must attach to it very controlling consequences, upon questions of real property in the state: but, on consideration, this does not appear to be included in that class of cases, which have been affected by the principle resorted to, the general consequences of which, in its operation, if sanctioned by this cause, to the prejudice of *bonâ fide* purchasers, probably without notice, is an argument why it ought not to be extended. 4th, The third cause of demurrer urges, that the discovery prayed, would endanger the defendants in law, and subject them to a penalty. On this point, as a *scienter*, or knowledge of the seller's being out of possession, and a subsisting *adverse possession*, at the time of the sale, are necessary to constitute an offence against the statute alluded to, the answer to this part of the bill, disclosing the fact prayed, might be so drawn, as not to contain any admission which would endanger the defendant in law. 5th, The remaining objection is, that the complainants blended in their bill *relief* with a prayer for *discovery*, when, from aught appearing in the case, a court of law, upon the discovery being obtained, is competent to afford adequate redress. As the Chancellor's retaining jurisdiction on the *point of relief* in this cause, would involve a consideration of the trial by jury, the question presents an aspect peculiarly

important. On this point, though there may be sufficient grounds disclosed to change the jurisdiction, yet, as the complainants were properly before the court upon the point of *discovery*, the defendants were bound to answer this part of the bill; and the demurrer, therefore, to the whole, was not well taken, and ought to have been over-ruled. The cases on this question are contradictory. The law is not bound down by a series of uniform decisions, in a manner not to be shaken, and so as to preclude the consideration of the reason of the rule. Upon this last ground, the reason of the rule, it will be seen, that a decision in conformity to the above opinion, will, at the same time that it discountenances the doctrine of *turning round* the suitor upon nice and critical exceptions, operate no prejudice to the defendants upon the merits of the question; because a judgment, over-ruling a demurrer in chancery, is, in its effects, in nature of a respondeas ouster in a court of law. The opinion of the court, therefore, is, that the causes assigned do not sustain the decree in this cause, and judgment of reversal must be entered.

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Andrew Vos and John Boonen Graves, *against*
The United Insurance Company.

IN Error from the Supreme Court. The special verdict on which judgment was rendered, contained the following facts. On the 21st June, 1798, the Defendants, for Vos and Graves, insured eight thousand dollars on the American brig Columbia, from New-York to Amsterdam, at a premium of 17 1-2 per cent. At this time neither party knew the Texel was blockaded. It was warranted in the policy that no loss should arise to the Defendants, by reason of capture, seizure, or detention, in the port of Amsterdam, the Texel, or the Vlie, and that the cargo was American property. The Plaintiffs for an additional premium of two and a half per cent. obtained liberty from the Defendants, to touch and trade at Hamburg, which was granted, in consequence of the following letters written to the Defendants.

A mere sailing for a port understood to be blockaded, is not a breach of neutrality so as to affect a policy of insurance.

" *New-York, 25th June, 1798.*

" SIR,

" The cargo of the brig Columbia, Benjamin Weeks, master, being insured at the New-York Insurance Company,

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" at and from hence to Amsterdam, on the 14th instant, and the accounts daily receiving, rendering motives of precaution extremely necessary; we therefore propose to order the vessel to touch at Hamburg for orders, which may be done without delay, as she is to go north about, *provided you will permit it in the policy without any additional premium*: And should our friends advise that it would be dangerous to proceed to Amsterdam, *in that case* the risk should end at Hamburg.

" We are &c.

" VOS and GRAVES.

" *To the President of the United Insurance Company.*" }

THE SAME TO THE SAME.

New-York, 27th June, 1798.

" SIR,

" On being informed that the Texel was blockaded by the English, and a ship from Philadelphia, bound to Amsterdam, had actually been sent to Yarmouth, we applied to you yesterday to obtain leave for the brig Columbia to touch at Hamburg for orders. From this circumstance we conceive it highly interesting to the office, to grant the permission, without the charge of an additional premium. At any rate, we would rather have the vessel proceed on as the policy now stands, than to augment the premium; for the circumstance of the blockade *was unknown to us*, when the insurance was effected, and it is probable it may be *withdrawn by the time the vessel reaches Amsterdam.*"

The Plaintiffs had property on board to the amount of the sum insured. They also owned the brig, which, with the cargo, was American property. The brig sailed on the voyage insured, and arrived at Cruxhaven, on her way to Hamburg, in August 1798. In three or four days after, she sailed from Cruxhaven for Amsterdam. On the day she left Cruxhaven, she was captured by a British frigate and carried into Yarmouth. The brig and cargo were libelled in the high Court of Admiralty of England, and were condemned by Sir William Scott, who pronounced the following sentence. " There is pretty clear proof of neutral property in this case, both of the ship and cargo; but the vessel was taken attempting to break a blockade. It is necessary for me to

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“ observe, that there is no rule of the law of nations more
 “ established than this, that the breach of the blockade sub-
 “ jects the property so employed, to confiscation. Among all
 “ the contradictory positions that have been advanced on the
 “ law of nations, this principle has never been disputed ; it is
 “ to be found in all books of law, and in all treaties ; every
 “ man knows it ; the subjects of all states know it, as it is
 “ universally acknowledged by all governments, who possess
 “ any degree of civil knowledge. This vessel came from
 “ *America*, and, as it appears, with innocent intentions on
 “ the part of the *American* owners ; for it was not known at
 “ that time in *America*, that *Amsterdam* was in a state of in-
 “ vestment ; and therefore there is no proof immediately af-
 “ fecting the owners. But a person may be penally affected
 “ by the misconduct of his agents, as well as by his own acts :
 “ and if he delegates general powers to others, and they
 “ misuse their trust, his remedy must be against them. The
 “ master was by his instructions to go *north about to Crux-*
 “ *haven*. This precaution is perhaps liable to some *unfavour-*
 “ *able* interpretation : the counsel for the claimant have en-
 “ deavoured to interpret it to their advantage ; but at the
 “ best, it can be but a matter of indifference. When he ar-
 “ rived at *Cruxhaven*, he was to go immediately to *Ham-*
 “ *burgh*, and to put himself under the direction of Messrs.
 “ *Boue* and Company. They therefore were to have the en-
 “ tire dominion over this ship and cargo. It appears, how-
 “ ever, they corresponded with persons at *Amsterdam*, to
 “ whom farther confidential instructions had been given by
 “ the owners ; and these orders are found in a letter from
 “ Messrs. *Vos* and *Graves*, of *New-York*, to *Boue* and Com-
 “ pany, informing them, that the *Columbia* was intended for
 “ *Amsterdam*—consigned to the house of *Crommelin*, to
 “ whom *Boue* and Company are directed to send the vessel
 “ on, “ *if the winds should continue unsteady, and keep the*
 “ *English cruisers off the Dutch coast :*” if not, they were to
 “ unload the cargo, and forward it by the interior naviga-
 “ tion to *Amsterdam*. *Boue* and Company accordingly direct
 “ the master “ to proceed to *Amsterdam*, if the winds should
 “ be such as to keep the *English* at a distance.” There is
 “ also a letter from the master to *Boue*, from *Cruxhaven*, in
 “ which he says, “ *Amsterdam* is blockaded.” We have this

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“ fact then, that when the master sailed from *Cruzhaven*, the
 “ blockade was perfectly well known both to him and the
 “ consignees: but their design was, to seize the opportunity
 “ of entering whilst the winds kept the blockading force at a
 “ distance. Now, under these circumstances, I have no
 “ hesitation in saying, that the blockade was broken. The
 “ blockade was to be considered as legally existing, although
 “ the winds did occasionally blow off the blockading squad-
 “ ron. It was an accidental change which must take place
 “ in every blockade: but the blockade is not therefore sus-
 “ pended. The contrary is laid down in all books of autho-
 “ rity; and the law considers an attempt to take advantage
 “ of such an accidental removal, as an attempt to break the
 “ blockade, and as a mere fraud.” But it has been said,
 “ that by the *American treaty*, *there must be a previous warn-*
 “ *ing*. Certainly where vessels sail without a knowledge of
 “ the blockade, a notice is necessary; but if you can affect
 “ them with the knowledge of that fact, a warning then be-
 “ comes an idle ceremony, of no use, and therefore not to
 “ be required. The master, the consignees, and all persons
 “ intrusted with the management of the vessel, appear to have
 “ been sufficiently informed of this blockade; and, therefore,
 “ they are not in the situation which the treaty supposes. It
 “ is said also, that the vessel had not arrived; that the of-
 “ fence was not actually committed, but rested in intention
 “ only. On this point I am clearly of opinion, that the sail-
 “ ing with an intention of evading the blockade of the *Texel*,
 “ was beginning to execute that intention; and is an *overt*
 “ *act* constituting the offence. From that moment the block-
 “ ade is fraudulently invaded. I am, therefore, on full con-
 “ viction, of opinion, that a breach of blockade has been
 “ committed in this case; that the act of the master will af-
 “ fect the owner to the extent of the whole of his property
 “ concerned in the transaction. The ship and cargo belong,
 “ in this case, to the same individuals, and therefore they
 “ must be both involved in the sentence of condemnation.”
 The mate, on his examination as a witness in the cause, de-
 posed—“ That it was generally understood among the Ame-
 “ ricans at *Cruzhaven*, at the time the *Columbia* sailed from
 “ thence, that *Amsterdam* was considered as a blockaded
 “ port, and it was so understood by himself and the Captain

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“ of the Columbia : That the British ship, upon falling in
 “ with the brig, immediately seized her as being bound to a
 “ blockaded port, and also, on the pretext of her having
 “ Dutch property on board : That it was generally under-
 “ stood by the Americans at Cruzhaven at the time the Co-
 “ lumbia left it, and it was understood by the captain and
 “ him, that it was the practice of British cruisers to stop
 “ vessels bound to Amsterdam, and send them back without
 “ seizing them, and only to seize in case of a second attempt
 “ to enter Amsterdam ; and that under this idea, the captain
 “ sailed for Amsterdam.” When it was generally believed
 in the city of New-York, that Amsterdam was blockaded, to
 wit, on the 18th of September 1798, the defendants insured
 the American ship Patriot, from New-York to Amsterdam,
 with liberty to touch at Altona within one mile of Hamburg,
 for 17 1-2 per cent. to return 2 1-2 per cent. if the voyage
 ended at Altona.

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Upon the facts thus found, the majority of the court gave judgment for the defendants, for the reasons assigned in the two following opinions, delivered by Mr. Justice Kent and Mr. Justice Radcliff.

Kent, J. On these facts two questions arise : 1. Will a voluntary attempt by the captain to break a blockade be sufficient to destroy the right of recovery on the policy ? 2. If it will, is there the requisite evidence in this case of that attempt ? In answer to the first question, I am of opinion that such an attempt takes away from the assured his right to recover ; for he can never be allowed to indemnify himself upon an innocent party, from the consequences of his own want of skill, or from his negligence or folly. The act of the master must be referred to his principal, who appoints him ; and whenever a loss happens through the master's *fault*, unless that fault amount to barratry, the owner, and not the insurer, must bear it. It is a fault in the master, to occasion a loss of property, from his carelessness or want of competent skill ; and much more is it the case, if he *wilfully* occasion that loss, as by resisting search, breaking a blockade, &c. He is charged with a discreet and faithful execution of his trust, and it is against his *duty* to expose the property unnecessarily to risk, either from natural perils, or from perils arising from the violation of his neutrality. It is a point not to be disputed, that an attempt

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* Millar, 136
to 144, 179 to
188. 2 Valin.
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knowingly to break a blockade, is a violation of neutral duty, and occasions a forfeiture of the property; and it cannot be supposed, unless it be so expressed, that the insurer takes upon himself such risk. The risk of fault in the master (barra-try excepted) is not a risk enumerated in the policy; and it would be very unreasonable, that the insurer should be holden beyond his *express* undertaking, for the fault or folly of the master, whom the insured selects and controls *. In answer to the second question, I have no doubt in concluding, there is sufficient evidence in the case of a wilful attempt by the captain to break the blockade of Amsterdam. This evidence results from the condemnation in the British court of admiralty, and for the conclusive effect of that sentence, I refer to my opinion in the causes of *Vandeneuvel v. the United Insurance Company, and Church*. There is also sufficient evidence, without resorting to the sentence. When the captain left Cruzhaven, he sailed *with the understanding* that Amsterdam was a blockaded port; and he sailed also under the idea, that if he should meet with a British cruiser in his attempt to enter Amsterdam, he would, for the first attempt, be sent back, and not seized. This appears by the testimony of the mate, and it is sufficient to establish the *fact* of the blockade as against the plaintiffs (it being the admission of their master) until they repel it by direct proof to the contrary. But there is no such contrary testimony in the case. It would seem, indeed, to be implied, from some of the observations of *Sir William Scott*, which are thrown into the case, that winds had occasionally *blown off*, or *kept at a distance*, the blockading squadron; but at what precise *time*, or to what precise *distance*, does not appear. We do not know, except by necessary deduction from the testimony of the mate, what was the actual state of the blockade, or how far the British cruisers were at the time in a situation to preserve it. Nor do we know the situation the vessel was in, or her proximity to Amsterdam, when she was captured. The mate informs us only, that the master understood when he sailed from Cruzhaven, that Amsterdam was blockaded; that he sailed with an intent to attempt to enter it, and with the understanding that for his first attempt he would only be sent back, and that he was captured the day he sailed. How near he had approached the coast of the Vlie and Texel, we do not know. He might have reached the coast, for it is

within the reach of a day's sail. Every reasonable conclusion that the admissions of their mate will warrant, is, however, to be drawn against the plaintiffs, so long as they furnish no other proof to explain or repel those admissions. My opinion accordingly is, that the existence of the blockade, the wilful attempt of the master to break it, his capture while executing that attempt, and at no great distance from, if not in, the neighbourhood of the blockading port, are all necessarily to be inferred from the case, and that judgment ought, therefore, to be given for the defendants.

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Radcliff, J. On the 21st June, 1798, the date of the policy, neither party knew of the investment of Amsterdam, and this excludes the idea, that, by any special agreement or understanding, the insurance could have been meant to extend to any peril, for breach of the particular blockade in question, if any existed. 1st. It is a settled rule, that the insured, in order to comply with his warranty, must not only maintain the property to be neutral, but so conduct himself towards the belligerent parties, as not to forfeit his neutrality: he must pursue the conduct, and preserve the character of a neutral. This being the import of the warranty, and the condemnation being founded on a breach of neutrality, it operates to preclude the plaintiffs, on the principles adopted with regard to the effect of foreign sentences, in the case of *Vandenheuvel v. the United Insurance Company*. 2d. In the present case, the plaintiffs, before the vessel sailed from New-York, to wit, on the 27th June, in consideration of law, had notice of the blockade. This appears by their letter to the defendants of that date. Although the information was not then certain, it was sufficient to excite serious apprehensions, and to put *them on their guard*, which, in judgment of law, is deemed competent notice*. The captain, however, before he sailed from Cruxhaven, had actual notice of the blockade; and there can be no doubt but the plaintiffs are liable for his acts. He sailed with the professed intent to evade it, if an opportunity should offer, but under an idea that, by the treaty of 1794, he was entitled to notice to desist, and to be sent back on the first attempt. The provision in the treaty on the subject, it is obvious, cannot apply to a case where the party *already possesses* the requisite information. This is the rule in all cases where a party is to be affected by notice. But it is objected, that

* 1 Atk. 490.
2 Fonb. 155.

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Against this judgment, on behalf of the plaintiffs in error, Brockholst Livingston argued that it was erroneous, because the defendants assumed every risk attached to an attempt to enter a blockaded port; because the condemnation of the high court of admiralty of England is manifestly unjust.—The defendants understood the *Columbia* was going to a port supposed to be in a state of blockade, and therefore insured the plaintiffs against a seizure and condemnation on that, as

well as on any other account. This appears from the policy, from the additional premium, and from the correspondence. The policy is to *Amsterdam*. This was effected without suspicion of a blockade. The risk, therefore, as to the future state of that city, fell upon the assurers. If news of the blockade had been received the next day, the plaintiffs were not bound to break up the voyage. The insurance being *at* and from New-York, the underwriters could not be compelled to refund any part of the large premium which was paid. The plaintiffs, thus circumstanced, were not obliged to unload their vessel, or be at the expense of a new insurance to another place; without saying a word, they might have gone on, and if taken, even *in an attempt to enter*, the defendants must have paid. Thus a merchant who, in peace, warrants his property neutral, does not insure against future events, or engage the goods shall so continue the whole voyage. If war break out the next day, he is still covered*. The insurers, in the words of Lord Mansfield, "take upon themselves all future "events and risks, from men of war, enemies, detention of "princes, &c. &c." An insurance to a blockaded port is not within the description of unlawful contracts. The laws of the United States do not prohibit such commerce. If publicly known that an American vessel was going to a port in that state, no measures would be used to stop her, nor would a seizure or forfeiture in this country follow. The law of nations permits the same thing, but the vessel may be seized as prize, by the surrounding squadron, if taken in an attempt to enter. By this is intended, that the law of nations attaches no illegality to the bare inception of such a voyage, unaccompanied by a subsequent attempt to enter. If it be true, that after the report of a blockade reached New-York, the plaintiffs might have proceeded without saying any thing to the company, their case is greatly fortified. The increased premium which was exacted of them, shows a blockaded port was contemplated. The assured, with good faith, and to avoid a greater risk to the other party, than may at first have been designed, immediately announce to them the intelligence of a probable blockade—and ask permission to direct the *Columbia* to touch at *Hamburgh*. This became necessary to prevent a deviation. Here was an opportunity afforded to the underwriters of offering to cancel the policy,

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or of consenting to the vessel's going to Hamburg, which was in the way, and voyages to which, appear by the verdict to have been effected at exactly the same premium.—One would think they would gladly embrace a proposal so reasonable, and be relieved from the risk of the *Columbia's* going to Amsterdam. No: They are perfectly satisfied with the contract as it stands, and will not consent to any alteration, without an additional premium of two and a half per cent. which, not to incur the consequences of a deviation, the plaintiffs allow. This was emphatically declaring on the part of the underwriters, that they preferred the risk to Amsterdam, blockaded or not, to the *Columbia's* going to Hamburg, which they would only permit for a farther consideration. The policy was varied accordingly, and the insurance then continued to *Amsterdam*, with permission to touch at Hamburg. Is it not strange, that altho' the defendants were now fully apprized that Amsterdam was supposed to be blockaded, they leave the policy in that respect as it first stood, and make no objection to that part of the voyage? It may be answered, that they contemplated a termination of the voyage at Hamburg, should its continuance to Amsterdam be attended with danger. It is unfortunate that the interpretation of a policy is not, as of other instruments, to be collected from its own expressions. Recurrence is constantly had to letters, conversations, representations by brokers, and other matters; so that a contract for insurance is frequently converted into a heterogeneous compound of parol and written stipulations, the one in direct variance with the other—and the policy, which should be our guide, and is by itself perfectly intelligible, is involved in impenetrable obscurity by the addition of much extrinsic matter. But if the plaintiffs' letters, altho' not a line of them be inserted in the policy, are a part of the contract, they leave it *optional* with the plaintiffs to proceed to Amsterdam, in case their friends should think it *not dangerous*. This was leaving the right of the assured, to proceed, entirely at the discretion of a third party, which, if abused or improvidently exercised, could not affect them. It is not found, and therefore is not to be presumed, that their friends *did* think such a continuance of the voyage dangerous. The probability is the other way. The friends of the assured, no doubt, thought there was no danger, or they

would have ordered the vessel to Hamburg and received a handsome commission. If they really thought it dangerous, and still sent the vessel on, the underwriters are liable, for they reposed themselves on their discretion. If we consult the policy, nothing is said about the opinion of the plaintiffs' friends, altho' such stipulation might have been inserted in one line. The option is here left to the insured without any reserve or qualification. They may end the voyage, *if they please*, at Hamburg. In that case they are to be refunded two and a half per cent. If the brig proceeds, the company retain the whole premium. Here then were two and a half per cent. given, for the voyage between Hamburg and Amsterdam, and when we are taken in performing *that part of it*, we are refused payment. The defendants should have inserted in the policy an express stipulation, that the voyage should end at Hamburg, if a blockade existed. Having omitted so to do, they are too late to say they did not mean to assume every risk produced by such a state of things. It is important to show, that Messieurs Vos and Graves were entitled to proceed to Amsterdam, blockaded or not, because then the sentence, of which thus far they are the victims, just or unjust, cannot affect them. This step was illegal in them, as it respected the defendants, or they cannot suffer by the condemnation. If their contract has not been violated, the underwriters must bear the consequences of the confiscation. We proposed, however, to examine the decree, which we conceive unjust, and therefore not binding as between the present parties. The property was condemned for "a breach of blockade," and reasons are assigned at some length. It is with reluctance I can bring myself to animadvert on a judgment proceeding from a source so pure and intelligent. No one holds in higher estimation the talents and integrity of the eminent character who delivered it, or more admires the bold, eloquent, and yet perspicuous language in which his opinions are uniformly given. In the cases decided by Sir William Scott, the mind finds relief from the fatigue and disgust which it contracts by a review of the iniquitous conduct of other Admiralties, which present one uninterrupted scene of rapine and oppression. But without pretending to derogate from his character or abilities, I cannot think the condemnation of the Columbia authorized by the Law of Nations, or the Treaty

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between the two countries. It will not be denied that an attempt to enter a blockaded port is prohibited to neutrals. Such interdiction is inevitable. Blockades would become idle ceremonies, were all the world permitted, as at other times, to enter the harbour, and succour the besieged. The investing foe therefore is permitted to interrupt such entrance, and to confiscate property taken in the attempt. But this being a right, in restriction of those of neutrals, who are to suffer as little as possible by the hostilities of others, ought not to be enforced, unless where a blockade *actually and completely* exists. If the squadron be accidentally absent, or blown off, neutrals are restored to their rights, and exempt from the penalty, which in the other case they incur. Who can say the fleet will ever return, or the blockade be renewed? If a neutral can take advantage of this temporary suspension of the blockade, whether produced by necessity or choice, he should not suffer for the attempt. If the blockade be raised, whether by the appearance of a more powerful foe, or by the act of God, it no longer continues, and the port becomes open to all the world. If superior force confers a right to impose on neutrals this restraint, they in turn, without any imputation of fraud, are restored to the privilege of a free trade, the moment the ships are removed, and have a right, if they can, to take advantage of such removal. The Columbia, it will be remembered, was captured by a vessel not belonging to the blockading division. Where the squadron was at this time, whether blown off or not, does not appear; at any rate, it will be allowed, that Sir William Scott's interpretation of this right, as it respects neutrals, is very rigorous. But, without combating this construction, we say, the Columbia ought not to have been forfeited. To justify a confiscation for breach of blockade, there should be—notice of its existence—an attempt to enter—and, under the British treaty, a turning away, and a second attempt to go in. Sir William Scott admits the necessity of a notice, and a warning not to enter.—*Rob: Rep: 124.* What then shall amount to notice? Will a mere report justify a master, who has signed bills of lading for one port, in going to another? Suppose his information incorrect, and a loss happen, will it not be a deviation? Would not the owners and shippers in that case lose their insurance, and he be responsible to both? The

obstinacy of a Danish master, in the case of the *Henrick and Maria*, mentioned in the first volume of Robinson's reports, evinces what was his sense of duty in a similar emergence. Being warned by an English ship not to go to a Dutch port, he answered, that "he must proceed *according to his bills of lading*, that he could not answer to his owners to go to any place but Holland." In our case no such warning is pretended. It is admitted by the Judge, that the *Columbia* left America "with innocent intentions on the part of the owners; for, says he, it was not known at that time in America, that Amsterdam was in a state of investment, and therefore there is no proof immediately affecting the owners." After this concession, we contend that nothing short of being *turned away*, could justify the captain in not proceeding to Amsterdam. A contrary rule would lead to great embarrassment, and put it in the master's power to break up a voyage on light rumours, or very imperfect accounts of a blockade. If aught, short of actual turning away, be sufficient, it should be settled with precision, what species of notice or information, shall justify a captain in going to some other port? Whether such notice must proceed from one of the blockading ships, or may come from any other quarter? Whether such an interruption will justify an abandonment to the underwriters? And who is to sustain the loss, the merchant or assurer, in case none or a bad market offers at the port into which the vessel is compelled to go? To avoid these difficulties, it is settled that nothing short of an *attempt to enter* justifies a seizure. "If I lay siege to a place, or only form the blockade, says Vattel, I have a right to hinder any one from *entering*, and to treat as an enemy whoever attempts to enter the place, or carry any thing to the besieged without my leave." Vattel, Book III. chap. VIII. Sect. 117. A mere intention, or sailing with such view, is not sufficient—an intention to commit an offence is not punishable. Sir William Scott incautiously considers, "the sailing with an intention of evading a blockade, an *overt-act*, constituting the offence." It would be quite as correct to term a preparation of poison, with an intent to kill, an *overt-act* of murder. As in the latter case, remorse or fear may arrest the career of the assassin; so in the other, if the blockade is found to exist, when the vessel approaches, the master may

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change his course without infringing on the rights of the enemy. It is important that Sir William Scott admits the offence here, consisted only in *intention*. An attempt to enter, is not pretended. This also appears from the verdict. The seizure was made on the very day of the Columbia's departure from Cruxhaven. The distance thence to Amsterdam does not appear. If it be once granted that a vessel, the moment of weighing anchor, with an intention of going to a blockaded port, may be seized, as was done here, where are we to stop? If it be rumoured in New-York, that Calcutta, Batavia, or the Isle of France, be in a state of blockade, shall no vessel in the United States laden for either of those ports, set sail until its termination be formally announced? What injury is done to the powers at war, if a hundred of our vessels sail with an intention of going thither, and yet turn away, if the coast be not free? The fleet are stationed there to prevent vessels from entering. If none attempt to pass, the object of the blockade is accomplished. The Columbia's intention to go up the Texel would not injure the British. If they were at its mouth, they would obstruct her course. If not there, they had no cause to complain. The captain certainly had no design to persist, if a blockade existed. Take his intentions collectively, instead of forming the *overt-act* which has been mentioned, they bespeak a perfectly innocent conduct on his part. If the fleet had disappeared, from whatever cause, before his arrival, with great deference, I should not think it very criminal in captain Weeks to have gone to Amsterdam. The law of nations did not require him to cruise off the Texel, to ascertain whether the blockade would be resumed. But the master knew of the blockade when he left Cruxhaven. True; and "*he and all the Americans* there, " understood it to be the practice of British cruisers to stop " vessels bound thither, and send them back, and only to " seize in case of a *second* attempt to enter, and under this " *idea* it was, he sailed for Amsterdam." Nothing blameworthy can be inferred from this conduct. As it regarded the underwriters, he had a right to go to Amsterdam, altho' blockaded; such being the true understanding of the parties, as is confirmed by the several insurances which were effected in New-York, after it was known the investment of that place was formed. From this may be collected the sense of our

merchants on a point which has been decided with so much severity against them. Their understanding is, that sailing with an *intent* to go to a blockaded place, is no cause of forfeiture. As it respected his owners, it was the masters duty to be better informed than he was at Cruzhaven, of the situation of the Texel. The reports there might be ill-founded. As the voyage did not begin there, he was right in going on. As it concerned the British, no wrong would be done to them. The squadron, if there, could easily send him away. If not, their rights could not be impaired. By the British Treaty, captain Weeks was authorized to act as he did. He should have been turned away, and not seized until he made a *second* attempt. This was his conception of the Treaty, and it was accurate. Altho' the obligation of such warning be confined to vessels, whose masters knew nothing of the blockade at the time of sailing, yet as the nature of this knowledge or notice is undefined, it is the safer construction to say, that no report or any information short of a formal notification to foreign ministers, which usually takes place, shall be deemed sufficient. But, rejecting this interpretation, it is not alleged that the owners knew of the blockade when the Columbia sailed from New-York. The contrary is admitted by Sir William Scott. This then being the inception of the voyage, brings her case within the letter of the Treaty, so that nothing short of a warning, and a second attempt to enter, should have exposed her to confiscation. I forbear to make any remarks on the conclusiveness of this sentence, as between the parties to this suit. As to its direct effect on the vessel and goods, it is and will remain so. Were the Columbia and her cargo now lying in the harbour of New-York, the former owners could not touch them. The purchasers under the decree would be protected. This is going far enough, and all that is intended by paying respect to foreign judgments. But in relation to the assured, and assurers, who were no parties to the litigation in the court of Admiralty, and who submitted, if at all, *ex necessitate*, to its jurisdiction, this court will be compelled, in order to do justice between them, to examine the grounds of their sentence. The object of the inquiry will be, not to reverse it, to which this tribunal is incompetent, nor to disturb any rights acquired under it, which would be improper, but to ascertain how far the causes as-

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signed were just, and if so, how the condemnation is to affect the present question. If captain Weeks had a right to do what he did, then this sentence is unjust, and instead of a defence, it forms another item or link in our proofs of loss. But if the sentence consist with the law of nations, still we say the underwriters are liable, because they insured us against every risk attending a voyage to a blockaded port. When the reasons of a sentence appear, a foreign court will ever review them. This is a rule so intelligible and fraught with so much plain and common sense, as to be liable to no misapprehension. It may be obscured, as often happens, but cannot be illustrated, by an anxiety to amplify and elucidate. It is not like the doctrine of a silent foreign sentence, being conclusive between parties to a policy in cases of warranty, which now also awaits its doom in this honourable court. Not a hundred volumes—not all the lawyers in the universe, can ever succeed in rendering such a position intelligible to men of common understanding. It requires a sublimation of genius, to comprehend one syllable of what is written or said on the subject. If Sir William Scott, in delivering this decree, had withheld his reasons, every one would have been compelled to conclude, as in the case of Goix and Low, that the Columbia was condemned *as enemy's property*. The judge having been more communicative than usual, we are relieved from the trouble of guessing, and the necessity of doing injustice, for in this case also, there was a warranty that the property was American, which is admitted by the decree, or the assured were inevitably gone. This court, we presume, will have no difficulty in examining the reasons assigned for this condemnation, and making up a judgment of their own on them. Suppose the Columbia had been condemned, altho' an unarmed merchantman, "as an article contraband of war," as was done with the Calloope by one of the West-India tribe; would this court hesitate to pronounce such a sentence a wicked departure from the law of nations, or to give the owner the full benefit of his insurance? In a word, the plaintiffs contend that they had a right to go to Amsterdam, blockaded or not. That if they had no such right, the master was not guilty of a breach of blockade. That he did only what was permitted by the law of nations, and the British treaty, and that therefore in every

point of view they are entitled to a reversal of the judgment of the supreme court.

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Troup, contra, insisted the judgment ought to be affirmed.

1. Because, by the universal received law of nations, the entry of a blockaded port, or even the attempt to enter it, with a knowledge of its being blockaded, is a just ground for confiscating the cargo, as well as the vessel, where they both belong to the same owner. 2. Because, it cannot be presumed to have been the intent of the parties, that the insurance in question should be made to Amsterdam, as a blockaded port; for if such had been their intent, it must have been accompanied at least with an implied licence from the defendants in error, to the plaintiffs in error, to attempt to break the blockade, at the risk of the defendants in error, if a state of things should be found to favour the attempt; and it will be contended, that under such circumstances, the insurance was void in its commencement, as being contrary to law. 3. Because, supposing the insurance was not intended to be made to Amsterdam, as a blockaded port, the attempt by the master of the Columbia to break the blockade, in pursuance of discretionary orders given to him for the purpose, by the plaintiffs in error, who were the owners of the vessel, is not one of those acts of the master, for which the defendants in error are liable in damages to the plaintiffs in error. 4. Because, it clearly results from the facts stated in the record in this cause, that Amsterdam was a blockaded port; and that the master, with full notice of its being so, attempted to break the blockade. And it will be argued in behalf of the defendants in error, that such attempt of the master has discharged them from all responsibility to the plaintiffs in error.

Per curiam. The question in this cause is, whether the sailing of the brig Columbia from Cruzhaven with a destination for Amsterdam, and an understanding that it was blockaded, is a breach of the blockade, and legal cause of capture and condemnation? The question may be qualified, perhaps, with the addition of an intention to enter the Texel, in the event only of the blockading squadron being blown off the coast, so as to leave the port in fact open for entrance. There is nothing in the verdict, or the assumption of facts by Sir William Scott, as the grounds of his determination, to warrant the conclusion of an attempt to break the blockade, any

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farther than the same is supported by proof of a sailing from Cruxhaven for Amsterdam. Upon fundamental principles, on which our municipal code of criminal law is established, intention, with some very peculiar exceptions, is not made the subject of judicial animadversion. That the moral law, which arraigns intention, should be adopted in the law of nations, with a greater latitude than in our municipal system, is a subject of some surprise, especially when the application is for the benefit of belligerents, and to the prejudice of neutrals. In intention, there is nothing certain and permanent ; it is controlled by every reflection ; is changed, dropped, and renewed, by the occurrences of every hour ; by the constant vicissitudes to which the agent is subject ; the enterprise, on a nearer view, appals ; the locus penitentie is embraced.—If there is an inception of the undertaking, by advances towards the theatre of action, (as the sailing from Cruxhaven in this instance) how wide a space yet intervenes !—to the dominion of how many various causes is the intention subject, before the act could be completed ! the information of every hour may change the destination ; the receipt of counter-instructions from the owner may arrest further progress ; the perils of the sea overwhelm ; the information received at Cruxhaven that induced the sailing, may be contradicted ; and lastly, before the vessel may arrive on the line of investment, the blockade may be, by instructions from the admiralty, withdrawn, or raised. The rule that the sailing with a destination for a blockaded port, is a breach of blockade, as urged upon the court, is undefinable in relation to distance between the port of departure and that of destination, and will produce great uncertainty and vexation. Nothing is to be found in the verdict or facts stated, or assumed in the sentence of the admiralty, from which to infer the progress of the brig from Cruxhaven to the Texel ; Sir William Scott meets her at the threshold, at the port of departure, and pronounces the sailing with an intention of evading the blockade, to constitute the offence : these are his words. It is fairly presumable, that the ground thus taken by the judge, corresponded with the proof, was as broad as the evidence would justify. The record in the cause presents no fact to warrant a contrary conclusion. No inference is to be made from the plaintiffs' communication by letter of the 27th June, that the defendants

consented to an attempt to enter a blockaded port, as that letter closes with the observation, that the blockade might probably be withdrawn before the arrival of the vessel. Therefore quite the contrary is rather to be supposed. It is unnecessary to give an opinion on the case of an actual attempt to enter a port during the interruption of the blockade, by reason of the blockading squadron being blown off; as, in this case, no such attempt was made, nor is the fleet found to have been so blown off. It is therefore the opinion of the court, that there is no authority of precedent binding on it, to warrant the rule adopted by the admiralty sentence in this cause; that such rule is opposed to essential principles, uncertain in its application, and highly vexatious to neutrals; that the principle of the late treaty between England and Russia is more propitious to the interests of commerce, and sufficiently favourable to the rights of belligerents, and merits high respect from all neutral powers. Therefore the judgment below must be reversed.

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IN error from the Supreme Court. The plaintiff (who was also plaintiff below) declared on a policy of insurance, in which both vessel and cargo were warranted "*American property.*" The plaintiff was a Frenchman by birth, who emigrated to this country flagrante bello, and was naturalized in 1796. His ship, and that part of her lading which belonged to him, were condemned by the Judge of the vice-admiralty at Nassau, in New-Providence, because the plaintiff "was, at the commencement of hostilities, and still is, a citizen or subject of the French Republic." A special verdict having been found, it was referred to the court to determine whether the plaintiff was entitled to recover as for a total loss, or only for a return of premium, or whether the verdict should be entered for the defendants. Judgment having been given for a return of premium, the case was brought up, on the same points which were made below. 1st, Whether the warranty of neutrality was complied with? 2d, Whether there was not an undue concealment in not disclosing the period of naturalization, that the underwriters might have calculated against

If a belligerent emigrate to a neutral country flagrante bello, and be there naturalized, a warranty of neutrality is supported by such naturalization, nor need he disclose to the underwriter the period of his emigration.

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the risk of confiscation, for the reason assigned by the sentence promulged?

Per curiam. The first question arising for the consideration of the court, in this cause, is, *whether the plaintiff has verified his warranty of American property in the goods insured?* The determination of this point involves the important question, whether the Plaintiff is to be deemed, *for the purposes of commerce*, an *American Citizen*. On this question, while the claims of a state upon its citizens, when surrounded and pressed by its enemies, are recognized; while the course to which duty prompts is plain, and readily perceived; yet so different are the circumstances of different states, so various their policy, that the right of citizens to emigrate during war, must, so far as respects the parent state, depend on the particular ordinances of each individual community. What might not be inconsistent with good policy, in a state possessed of an overflowing population, and a scanty subsistence, would be quite different from that of a state with a thin population, requiring all her hands for defence, and with sufficient bread for all her citizens. Was the condition of all nations alike in this respect; was the same reason and necessity for prohibiting emigration during war common to all, the rule contended for by the defendants, would have been long since settled, as a *fundamental principle of the Law of Nations*, and expressed in language too unequivocal to admit of a doubt, at this period. If a state is assailed by external enemies, and requires for defence the united efforts of all its citizens, of all that it has given birth to, a prohibition against emigration, as we have witnessed in France by the ordinances of 1704 and 1744, will attain all that is necessary in this respect, to the safety and defence of the state. If such prohibition is not interposed, the door is open to emigration. But is an emigration, which is lawful in relation to the parent state, equally so in reference to the enemy of such state? As a general rule, it is so. At the same time, should the citizens of a belligerent power, in concert with the state, or for the purpose of multiplying the warlike resources, or aiding the enterprises of the state, emigrate to, and take a stand in a neutral country, in order to mask mercantile projects under a neutral flag, there can be no hesitation in pronouncing such emigration *fraudulent*, and that an establishment, and residence, for such unwarranta-

ble purposes, cannot acquire to the emigrant a neutral domicil, he still would continue a member of his native family, and as such must participate in, and be affected by the fortunes of the parent state. When such a case is brought before the court, such a determination will be had, as will preserve to the belligerent the full exercise of his rights over the property of its enemy. But because the right of emigration may be abused in time of war, it by no means follows, that such right does not exist; and though it may be difficult to detect and punish such abuses, the argument from thence, against the right, cannot prevail. As far as appears from the record in this cause, the emigration of the plaintiff proceeded from a common principle of action that prevails more or less in all periods, and all countries; for the subsistence of himself and his family, he removed to and acquired a domicil in this state. This domicil, upon general principles, confers for the purposes of commerce, the right of an American citizen. Native Englishmen, domiciled in America, by a decision of Westminster-Hall, participate in the rights of American citizens, in relation to trade between America and the East-Indies. It will be unnecessary to consider whether the situation of the parent state was not such, at the period of the plaintiff's emigration, as to have no claims upon its citizens; as rent with factions and violence, and yielding no protection. Upon the point of *undue concealment*, raised in the cause; after the foregoing opinion, it will be necessary only to add, that if the faith of contracts should be deemed to have required of the plaintiff a disclosure of his condition, *as affording a pretext for condemnation*, *undue concealment* is a fraud, odious in law, and as such, not being found by the verdict, is not to be presumed. For the foregoing reason the judgment of the supreme court ought to be corrected, and the judgment here be as for a total loss.

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der and oth.John R. Livingston, *against* William Rogers.

IN an action on a stock contract, the plaintiff, to establish a tender of the stock, called on Gulian M^c Evers, who swore that he, under the authority of a letter of attorney, made to him by the plaintiff, with whose hand-writing he was acquainted, and attested by John Wilkes, a notary public,

Parol evidence of the contents of a letter of attorney, may be adduced, if the person o

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whom it was
given prove it
to have been
lost.

did, after due notice to the defendant, attend to transfer the stock, but the defendant never appeared. That after this, the letter of attorney was, by the witness, deposited among some papers, and had been since lost. John Wilkes deposed, that he never subscribed any letter of attorney as a witness, without seeing it first executed. The plaintiff then offered to go into parol evidence of the contents of the letter of attorney, but this being over-ruled by the judge who tried the cause, a bill of exceptions was tendered, on which the case came before the court. The defendant, in support of the judgment below, relied on the following points: 1st, That the letter of attorney, being a material link in the evidence, ought to have been shown to the court and jury, that they might determine on its certainty; and where there is a subscribing witness to an instrument, it must be established by him, if within the jurisdiction of the court, such being the agreement of the parties. 2d, That the production of deeds can be dispensed with, only where they appear to be in possession of the opposite party, who has been duly served with a notice for their production; or where they have been lost or destroyed, not by the laches of the party to be benefited by them, but by fire or other accidents. 3d, That in the whole of this case, the conduct of the agent or attorney of the plaintiff, must be considered as that of the plaintiff himself, who cannot allege his own, or his agent's carelessness, as a reason for the non-production of papers he was bound to preserve.

Per curiam. The question upon the bill of exceptions interposed in this cause, is, *whether it be competent for the plaintiff to give parol evidence of the contents of the letter of attorney to Mc Evers, under the circumstances detailed in the bill of exceptions, or must the instrument itself be produced?* The ancient rule of the common law was highly rigid in this respect. It dispensed with the production of instruments in a few select cases, and then only for peculiar and specific causes. But experience under that rule, has, in the progressive improvements of English jurisprudence, resulted in a relaxation of the law on the subject. The non-production of instruments is now excused, for reasons more general, and less specific, upon grounds more broad and liberal than were formerly admitted. In 3 D. & E. (151)* a declaration on a deed

* Read v.
Brookman.

was sustained, and the *profert dispensed with*, upon the general allegation of a loss by *time and accident*. In *Beekford v. Jackson* (Esp. Rep. 337) the Plaintiff counted on a deed *lost or mislaid*; upon which issue was taken, and the same recognized, as warranted in law, by Lord Kenyon, who presided at the trial. Other cases are to be found in the English reports, of similar import, sanctioning the same principle. Upon the authority of those cases, and the reason of the thing, we are of opinion, that parol evidence of the contents of the letter of attorney to Mr. Mc Evers, ought to have been received, and that therefore error has intervened in this respect. Upon the admission of such testimony, should the trial disclose evidence, or reasonable grounds of suspicion, of a suppression of the instrument, of *mala fides* in the plaintiff, or should the evidence of its existence and legal efficacy not be clear and satisfactory, it will become the duty of the court to direct and charge the jury for the defendant; a *venire facias de novo*, must therefore be awarded.

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James Johnston and Robert Weir, *against*
Daniel Ludlow.

ERROR, from a judgment of the supreme court, in an action on a policy of insurance on goods, from New-York to La Vera Cruz. The instrument contained the following clause: "That the property be warranted, by the assured, "free from any charge, damage, or loss, which may arise in "consequence of a seizure or detention of the goods hereby "insured, for, or on account of any illicit or prohibited trade, "or any trade in articles contraband of war." From the special verdict it appeared that the plaintiffs, who were the same in both courts, had shipped, besides the property insured, six blocks of tin and seventy-eight boxes of tin plates. That the latter were condemned as contraband, and the goods insured, as belonging to the same owners, British subjects, trading with an enemy to their mother country; but that the defendant knew, at the time of subscribing the policy, the plaintiffs were subjects of the crown of Great-Britain, and that the tin was on board. Judgment having been pronounced in favour of the defendant, the case was brought before this court, and

The trade of a domiciled alien, carried on from the United States with the enemies of his mother country, is protected under the warranty against illicit trade. To constitute a breach of that warranty, the seizure must be for an actual illicit, prohibited, or contraband trade; a seizure and condemnation, under pretext of such a trade is no sufficient, if the trade be

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not in fact one
or the other.
A sentence in
a foreign court
of admiralty
is not even
prima facie
evidence of
any fact, if
there appear
in it enough to
rebut such a
presumption.

* *Maryat v.*
Wilson.

the following questions made: 1st, Was the trade, in relation to the characters of the plaintiffs, illicit? 2d, Was the article of tin in blocks and plates contraband of war? 3d, Did the warranty of the assured extend in judgment of law to a loss by seizure or detention, merely because illicit or prohibited trade, or trade in articles contraband of war, was alleged, when in fact the trade was not such?

Per curiam. On the first point the domicile of the plaintiffs being established here without any fraudulent motive, but for fair purposes of commerce, this court ought not to sanction the right of Great-Britain to seize, and confiscate their effects, as has been done in this instance. The case cited from Bosanquet and Puller's Reports, (page 430), * which arose under the article in our late treaty with England, regulating our East-India trade, is not inapposite. In that case, the English court conceded to a native subject, domiciled in America, the right of an American citizen, in relation to commerce with the Indies. On the second point, that there may be circumstances and occasions, in which *tin*, in blocks and plates, may become contraband, is not to be controverted; but while Judge Kelsall professes to detail not only the causes for condemnation, but those on which he did not ground himself, he does not disclose a case which would warrant the conclusion, upon the article in question, of contraband of war. He rests himself upon the bare shipment of the article; this cannot be subscribed to, nor will the allowed effect of the admiralty sentence, as prima facie evidence, avail the defendant here, as the presumption of facts, to warrant a condemnation, is repelled, by a detail of the precise grounds on which the sentence was pronounced. On the last point raised by the underwriters, that the warranty protects him against *any loss by seizure or detention, for, or on account of any illicit trade or contraband of war*, nothing in this provision is relevant to the case before the court. The clause literally extends only to partial losses, occasioned by a seizure or *temporary detention*, unfollowed by a *condemnation*; and if extended farther, it cannot have been the intention of the parties to the policy, to throw upon the assured a loss where there could be no fault in him; when no illicit trade or contraband existed in fact, merely because a pretext of that kind is set up to cloak the condemnation. The expression, "*for and on account of*," is not equi-

valent or convertible into the words *under pretence of*, but may well be understood to mean *for the cause of*; implying the actual existence of either illicit trade or contraband, as producing such loss or damage. No other construction ought to be admitted, unless the language of the contract is plain and unequivocal, necessarily inducing a contrary interpretation. The facts in the cause do not, as the law is now settled in Great-Britain, bear out the conclusion of the vice-admiralty court; nor can any thing in the warranty of the assured protect the underwriter. The judgment of the court below must be reversed.

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CASES
ARGUED AND DETERMINED
 IN THE
Court for the Trial of Impeachments
 AND
CORRECTION OF ERRORS,
 IN THE STATE OF NEW-YORK :
 FEBRUARY TERM, 1804.

Teunis Bergen and Michael Bergen, Appellants, and
 Wilhelmus Bennett, Respondent.

THIS was an appeal from the decision of his Honor the
 chancellor, permitting the respondent to redeem. The
 facts, as they appeared from the bill, answer, and testimony,
 were these. On the 12th of April, 1776, Wilhelmus Bennett,
 deceased, executed to John Vanderbilt, a bond for £600, pay-
 able in one year, with interest at 5 per cent. ; and, for further
 security, he also gave a mortgage on 67 acres of land, situated
 at a place called Gowanes. Shortly after this, on the 8th of
 November, 1776, the mortgagor died intestate, leaving the
 respondent Wilhelmus, then a minor of fifteen years of age,
 his eldest son and heir at law. The usual power to sell was
 contained in the mortgage, which, *together with the power*, was,
 on the 10th of April, 1777, registered in the office of the
 clerk of the county, *in the book for registering mortgages*. In
 the registry the mortgage was, as usual, abbreviated ; but the
 power was, though *not recorded as deeds usually are*, set forth
 in the registry of the mortgage, in hæc verba, excepting as to

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A power to sell
 contained in a
 mortgage deed,
 on default of
 payment, is a
 power coupled
 with an inter-
 est, and does
 not die with
 the mortgagor.
 If such power
 be recorded in
 the book for re-
 cording mort-
 gages, it is a
 compliance
 with the act.
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such power is a species of foreclosure, and under it a mortgagee may himself make a bona fide purchase. After a lapse of sixteen years from the time of such sale, known to the mortgagor or his heir, who, during that period, has remained passive, a redemption will not be allowed.

the latter part, declaring the sale to be a perpetual bar, &c. which was totally omitted. On the 13th of April, 1781, the appellant, Teunis Bergen, purchased the bond and mortgage for a bona fide consideration of £700. In 1783, the respondent left this state and went to Nova-Scotia. On the 11th of March, 1804, the appellant Teunis commenced the publication of a notice of the sale of the premises, under the power contained in the mortgage. The notice did not specify the boundaries of the land mortgaged. It began on the 11th of March, 1784, by an advertisement in a weekly paper, and was, after the first week, regularly continued in the supplement, which was the usual mode observed by the printer. The publication of the notice appeared, from a file of the papers, to have been duly made, except as to the 3 last days; but for those days the paper or supplement was missing. A copy also of this advertisement was, six months previous to the sale, fixed up on the outward door of the court-house of the county in which the lands lay; and there remained until after the sale, on the 11th of September following. At this, one Christopher Bennett, a schoolmaster in the neighbourhood, officiated as auctioneer, in consequence of a request from the appellant Teunis Bergen. The conditions exhibited at the time of Sale were as follows: "Brooklyn Township. Articles of the Vendue for the sale of "the land and meadow land, belonging to the Estate of Wilhelmus Bennett, deceased, containing 60 acres, more or "less, held this 11th day of September, 1784, by Teunis Bergen. Art. 1. That the highest bidder is to have the lot or "parcel of land when struck off to him. 2. That the Indian "corn and all the planting produce thereon is to be excepted. "3. That a drain of ten feet wide for the Collick be excepted. "4. That 100 rails of the cross fence of the corn be excepted. "5. That the money bid for the land is to be paid at the execution and delivery of the writings. 6. That in case the "person or persons, to whom it is struck off as aforesaid, cannot produce or procure a sufficient security, then and in "such case, the same lot or parcel of land shall be put up "again; and if the same is then sold for less, the first buyer "shall make up the deficiency; if sold for more, the first buyer "shall have no benefit by the sale." At the time of the vendue, no persons were present but the auctioneer, the appellants, one Cowenhoven, and a tenant who lived on the land.

There was but one bid, which was by the appellant Michael Bergen, for £700; and, after having waited 2 hours, to see if any person would come and offer more, it was struck off at that sum to him; and he, having attended to purchase on behalf of the other appellant Teunis, after a conveyance duly executed to him, reconveyed to Teunis.

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It appeared that the premises were not, at the time of sale, worth more than the principal and interest due; one Cowenhoven, to whom the land was offered, and who was a creditor of the mortgagor, having declared he would not give the amount of the bid. In 1788 the respondent came back to this state, and on the 3d of February, 1800, filed his bill. The respondent in support of the decree, alleged in his case, that the sale could not bar the redemption for which he prayed, as it was null and void, on the following grounds. 1st, Because the power to sell, contained in the mortgage, * "*was not recorded as deeds † usually are,*" before the execution of the conveyance to the purchaser. 2d, Because the notice of the sale was uncertain, and that the directions of the statute were not complied with in the publication of it. 3d, Because the conduct of the appellant Teunis Bergen, touching the sale, and the proceedings preparatory thereto, were actually fraudulent. 4th, Because the power to sell, contained in the mortgage, expired with the life of the donor. 5th, That the mortgagee was a trustee for the mortgagor, and as such, could not be a purchaser of the property, which he himself sold in that capacity.

* 1 Rev. Laws,
482. S. 6.
† See the act
relating to re-
cording deeds.
Ibid. 478.

Chancellor. Mr. President, The complainant has filed his bill for a redemption; to which the defendant answered, and a number of depositions have been taken, disclosing the circumstances stated in the case. On these, several questions have arisen, which have been very fully discussed by the counsel for the parties; but all of which, the first excepted, relating to the manner in which the power has been executed, must necessarily depend upon its validity at the time of such execution. The first of these questions, then, in the natural order in which they present, is, whether the power contained in the mortgage, expires with the life of the mortgagor? In the English code, no principles are to be discovered, which have been applied in their courts to bar an equity of redemption, *by the mere act of the mortgagee*, without the aid of judicial intervention. This

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device appears of native growth, originating from the circumstances of this country, and probably, principally from the disparity between the actual product, and estimated value of real estates. This may have rendered necessary a more summary and less expensive mode of barring the equity of redemption, than that which obtained through the medium of Chancery, a desirable object. It seems that previous to the year 1775, it had been a practice to introduce into mortgages, clauses authorizing a sale by mortgagees, and that many estates were then held under such sales. A statute was passed, reciting this circumstance, and declaring that *no good* and bona fide sales of mortgages, lands, tenements, or hereditaments, made or to be made by mortgagees or others, authorized thereunto by special power for that purpose in due form of law, from him or them who had the equity of redemption, shall be defeated to the prejudice of the bona fide purchasers thereof, in favour of, or for the advantage of any person or persons claiming a right of redemption in equity. To this was added a proviso, that this should not prejudice prior liens *by mortgages executed before such sale*, judgments, or decrees in equity. This statute saved the interest of mortgagees deriving title under mortgages executed before such sale, and all creditors, "to whom the mortgaged premises, or any part thereof, was *before* bound by any judgment at law or decree in equity." It appears to have been intended as a declaratory act, and if so, the proviso seems to contain a legislative declaration, that the power to sell did not irrevocably rest, *as a right*, in the mortgagee; for, if it did, the after acts of the mortgagor, or the judgments and decrees rendered against him, subsequent to the execution of the power, could not detract from the right of the *mortgagee, empowered to sell*; that it was intended they should, is to be collected from the consideration that the word *before*, in the latter clause, must clearly relate to the sale, and not to a period anterior to the execution of the power. But it may be taken in that sense, or as intended for greater caution, and as leaving the power to be construed as respects the cases excepted, without being affected by the statute. In either case, it cannot be considered as affecting the question in aid of the power. The powers treated of by Powell, in his admirable treatise on that subject, were, as he states, originally mere modifications of uses, whatever was equitable in which, the sta-

Powell on
Powers, 4.

tute of 27 H. 8. transferred to law : thus he distinguishes powers in relation to donees, and collateral powers, as simply relating to *uses and trusts*, and the enabling and restraining powers, as mere branches from the same generic trunk. I take it therefore that the doctrine deduced from Powell, as directly applying to the present subject, cannot be considered as correct, and that the principles by which it is to be tested, are to be sought for elsewhere. If the power in question was a *naked authority*, substituting the mortgagee or his representatives to represent the person of the mortgagor, it is conceded it must expire with the life of the person creating it. But it is insisted, an inseparable connexion exists between the power and its object, *the estate* ; that the duration of the former, must of necessity be commensurate with that of the interest in the latter, and that it can only be exhausted by its actual execution ; or that the power is in the nature of a covenant, running with the mortgaged premises. These positions I shall consider separately. As to the first : If a second mortgage was executed, intermediate the execution of the power, and the sale under it ; the second mortgagee is supposed to acquire an equitable lien, for the satisfaction of his security, on the mortgaged premises, if the fund mortgaged is more than adequate to the discharge of the first. An equity of redemption is considered as a subject to which a lien arising from a judgment, or decree, may attach. In neither case, can the subsequent incumbrances be considered as united in interest with the first. On the contrary, their relative situations show there must always be a collision, and frequently a direct opposition of interest. On the footing of a revocation of an authority, their situations are compatible with the practice which has prevailed on the subject ; but if the power is considered as an absolute vested right, the subsequent mortgages, judgments, and decrees, must be effectually over-reached by the sale, which must undoubtedly, on that ground, relate to the period when the right was acquired. The situation of the mortgagor and mortgagee at law, *if the authority is to be tested by strict legal principles*, operates against considering the power as an interest combined with the estate granted ; for, to all legal purposes, the fee, upon the execution of the mortgage, vested in the mortgagee, subject to the usual defeasance. At law, therefore, the title acquired by the purchase under the power, could only be cumulative ; and if so,

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2 Roll. Abr. 9.
cited 1 Bacon,
204.

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the revesting the estate, depending upon the contingency of payment in compliance with the condition, the interest of the mortgagee would be destroyed by such payment, and in either case the power must be rendered inoperative. If such is the situation of the parties at law, what reason can there be for an equitable interposition? The principles that this court pursues and cherishes will prevent it from relaxing the rules of law, unless it be for the purpose of promoting substantial justice. The intent of the parties has always been permitted to have a powerful effect in the construction of deeds; but though the intent in this case to delegate to the mortgagee, *his executors, administrators, and assigns*, a power to make a sale, is clearly to be inferred, it does not afford as satisfactory an inference *that the representatives of the mortgagor were intended to be equally bound with himself, to continue that power; and if not, there is no equitable principle on which the power can be extended beyond its mere legal operation.* I have not been able to discover, that the doctrine contended for, *that the power is to have equal duration with the estate*, has been recognized in any instance of this kind. Nor do I know a case, analagous to this, in the books; and from the industry and ability of the counsel who argued this cause, as well as my own fruitless researches, I think I may venture to say that none exists. Wherever it rests in the discretion of the court, to give a more liberal or restrained construction to the acts of parties, it is consistent, with the principles which regulate the conduct of this court, to examine the tendency of the several constructions which they will admit, and to mingle the inconveniences of adopting one or the other of those presented, as an ingredient to preponderate the scale, otherwise equally poised. By giving these powers a duration beyond the life of the mortgagor, they may in many instances disinherit his heirs; for here the parol cannot be permitted to demur; here is no saving of the rights of an infant, till his full age. The sale, if admissible at all, must be absolutely conclusive. By considering the right of sale as blended with, and co-extensive in its duration with the estate, subsequent incumbrances, by judgments, decrees, and mortgage, must be completely at the mercy of the first mortgagee. For if this right is a vested right, assimilating to that of property, every sale under it must have a retrospective effect, and completely destroy all incumbrances, intermediate to its acqui-

elon, and the sale under it. These are consequences of great importance, which I think this court cannot countenance; but on the contrary, ought to resist, especially as the primary object of the mortgage, *the enabling the mortgagee to hold the land mortgaged, as a pledge for the payment of the debt*, is thus defeated to the prejudice of the mortgagor's representatives, and as devices calculated to bar the equity of redemption, which, as susceptible of being wrested to oppressive purposes, ought to be leaned against as inconsistent with the original intent. Though this, I believe, is unexplored ground, I have very little hesitation in saying, that from my view of the subject, the doctrine of irrevocability cannot be sanctioned. As to the second position, that this power is to be taken as a covenant running with the mortgaged premises, there are no words of covenant. It imports to be a new grant of a power; it is a device intended to foreclose the mortgagor, without the intervention of judicial examination; and, if a covenant, it must become a subject of such examination, before it can have complete effect. If, as this clause is contained in an indenture, it is to be considered as the words of both parties, it might perhaps be construed a covenant *at law*, but that would not better the situation of the defendant; for the mortgage vests the estate in the mortgagee, and his heirs; the power is to him, his *executors, administrators, and assigns*. This, if a covenant, could not run with the land; for to effect this, there ought to be a privity of estate, between the representatives on whom the power and the estate would devolve, upon the death of the original parties; here the heirs of the mortgagee, by the limitation of the estate would take it, but the right derived from the power would pass to the executor; and thus the instant the mortgagee died, the connexion between the estate and the persons authorized to execute the power, would dissolve. A stronger reason, for not suffering it to conclude the heirs, is, that the defendant's title originated in a mere personal charge, and the same reasons which have already been given against a liberal extension of a power, would operate as forcibly not to extend the covenant by implication. If however it was to be considered as a covenant, binding on the heir at law, I should not be disposed to exert the powers of this court, to aid in concluding the mortgagor's representatives, as the estate is still in the hands of the representative of the mortgagee, by

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giving efficacy to the covenant here. It would be contrary to what I conceive to be the established principles in this court, which are to endeavour as much as possible to compel the parties to adhere to the true spirit and meaning of their original contract in cases of mortgages, *the security of the sum advanced to the mortgagor*. Some other points, involving considerations of great interest and extent, as to the doctrine of mortgages, were subjects of discussion on the arguments of this cause, but thinking, as I do, *that the power contained in the mortgage would not warrant the sale*, it would be useless to travel through these points, which merely relate to the mode of its execution. Upon the whole, I am of opinion that the complainant ought to be permitted to redeem; that it ought to be referred to a master to state an account between the parties, of the amount of the principal and interest due on the mortgage, the clear annual value of the mortgaged premises, and the nature of the improvements made by the defendant.

Bogert for the appellants. The respondent has lain by 12 years with the property under his eyes. In that time he never makes any application to redeem. He is silent till the premises are improved at an enormous expense, and have risen greatly in value. This is like waiting for a rise in stock, after forfeiture of the mortgage, 2 Atk. 303 †. The lapse of

† Lockwood v. Ewer. But had no interest been paid or demanded, the very time elapsed would, in the case alluded to, have been a bar on a mortgage of Stock, a foreclosure is not necessary. See King v. Dupine, n. (2) 2 Atk. 603.

† Talbot v. Linfield.

† Lacon v. Hooper. 1

Esp. Rep. 246. S. C.

But if it relate purely to mercantile trans-

such a period, as in the present case has taken place, is, we contend, when a person is on the spot, an acquiescence in what has been done. If not *that*, at least a laches, against which this court will never relieve. It is not necessary at this distance of time to prove continuance of the notice on the court-house door, and every minute exactitude of publication. It is enough to show it generally, or even once, as under the absconding debtors' act. The only intermission in advertising is of three days, and for those the papers are wanting. But, without them, the six months are complete; for, in legal acceptation, unless when otherwise expressed, a month in a statute means according to lunar, and not calendar computation. 1 Com. Di. 503 (B.) 1 Black. Rep. 450 †. 6 D. and E. 224 †. It is sufficient in any notice of the kind in question, to state the quantity of the land, the owner's name, the township and county, and the incumbrance under which sold. A specification of boundaries would not, to the community at large, render it more precise. The power is not a distinct deed, but part of a mort-

gage, and must therefore be registered or recorded as that is. I use the words as synonymes, because we find in Varick's edition, page 3 of the appendix, they are used as synonymous. Besides the object of the act is directed to third persons; it was framed for the benefit of purchasers, and not of the mortgagor, except as to that part of the clause which confines to persons of 25 years of age and upwards, the right of giving such powers. The provision of having the power recorded, before execution of the conveyance, shows it is meant only as evidence of title, in the purchaser, to establish his irredeemable right in the land. The English authorities demonstrate, that with them, register acts are only for the benefit of buyers to give notice of charges. The preamble of our act establishes a similar intention in our legislature. Therefore this, like all other statutes, is to be construed only with a view to suppress the mischief, and advance the remedy. The sum due on the mortgage at the time of sale, was £924; the refusal of Cowenhoven to take it at £700, does away all charge of fraud; nor does the non-attendance of persons at the vendue, afford room to infer the existence of any; the very amount of the incumbrance might keep them away, this being apparent in the notice. As to the power, *that* could never die with the donor. He could not have revoked it in his life. It is annexed to the security. In the common case of a power, accompanying an assignment of debts in satisfaction of a demand, it is irrevocable*; and that which cannot be revoked, survives. It is plainly a power coupled with an interest, and therefore runs with that interest. 3 Atk. 714 †. 1 Vez. 306. S. C. 1 Bac. Abr. 321. 2 P. Will. 120 ‡. The injury which it is apprehended the heir might sustain, can have no weight; for, as the ancestor might at once have sold absolutely, so he may order it to be done at a future day. He had complete dominion over it, and had a right to bar any, or all of his posterity. By the words of his contract, he has agreed to do this, on the happening of certain events. That the mortgagee is trustee for the mortgagor, is only true sub modo, as to the surplus. But allowing it to be so, there is no positive rule against a trustee's purchasing the subject matter of his trust. Whether the purchase will be valid or not, will depend on circumstances. 5 Vez. J. 678 §. The rule however can never apply where the trustee stands in the relation of cestui que trust also. In this situation a mortgagee

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actions, the term then means a calendar and not a lunar month. Therefore, in charter-parties it has the calendar acceptance. Jolly v. Young, 1 Esp. Rep. 186. And on a decree to foreclose at a certain period, the computation is by calendar and not by lunar months. Barn. 324. 2 Eq. Ca. abr. 605, pl. 38.

* Walsh v. Whitcomb, 2 Esp. Rep. 565. S. P.

† Hearle v. Greenbank.

‡ Eyre v. Countess of Shaftsbury.

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must be viewed, as he is interested to the amount of his mortgage, and bound to take care the estate is not sold under the amount due upon it. This distinction was taken in the cases of *Alaire v. Munro*, and *Le Roy v. Vreeder et al.* Besides, the sale is under a statutory provision, meant to have the effect of a foreclosure. This, therefore, is in some degree a purchase under a judicial proceeding, and had it been before a master in chancery, by virtue of an order of court, there could be no doubt on the subject. The present mode was intended by the act, to be in lieu of a bill to foreclose; it is therefore attended with the same consequences. The redemption then ought to have been sought within 5 years. *Lockwood v. Ewer*. 2 Atk. 303. A purchase by executors of a mortgagee through the intervention of a person who acted as trustee for them, was not impeached. *Tooke v. Hartley*, 2 Bro. C. R. 126.

Hamilton and Tomkins contra. The power in the mortgage has been registered in the customary manner adopted as to mortgages themselves. The act is specific that they shall be recorded previous to the execution of the conveyance, "*as deeds usually are.*" We all know this is in a book kept for the purpose, and in *hæc verba*. This too has been the practice, and *communis error facit jus*. It is a cotemporaneous exposition of the law. The intent of the legislature we cannot inquire into; we see what they have ordered. It would seem that the legislature contemplated some mode distinct from that prescribed for mortgages. It is an essential pre-requisite to the execution of the conveyance, and not to be dispensed with. The proceedings under the power being in lieu of a bill to foreclose, it is necessary strictly to adhere to every form, however minute. Every compliance must be made to appear. The deficiency of proof in establishing the notices required by the act, renders the sale absolutely void; and, as the notice on the court-house door was cut from a newspaper, allowing the publication in the paper to have been for six months, the notice on the door could not have been affixed for that period. Besides, it was in a supplement; and a supplement to a paper is not the paper itself. This exactitude is indispensable, because the law operates against a peculiar favourite of chancery. A favourite so great, that any clause, restraining the right of redemption, will ever be set aside, as repugnant to the original object of the parties, and contrary to the nature of a mortgage,

which in equity is regarded merely as a security for money lent*. If therefore it be in a deed, it is viewed as the result of an undue influence over the mortgagor, arising from the power which a lender naturally has over the person borrowing. On this account no limitation of time, short of 20 years, can prevent the exercise of this right, which is thus circumscribed, in analogy to ejectments at law, to preserve an uniformity of practice in all that relates to land. The foreclosure having taken place, is immaterial, if the property, at the time of filing the bill to redeem, be worth more than the principal and interest due. A boundary is as necessary a description of an estate as a county or town; and the articles of sale vary the quantity from that mortgaged. These and the reservations of the corn, &c. tended to lessen the value of the premises. They form one of many badges of fraud, apparent from the conditions of vendue, and the appointment of a schoolmaster as auctioneer. The mortgagee is a trustee, and emphatically so for the mortgagor. It is a settled principle that a trustee cannot purchase the object of his trust. 2 Eq. Ca. Abr. 741. Holt v. Holt †. 1 Ch. Ca. 190. Whaley v. Whaley, ‡ 1 Vern. 484. Whitacre v. Whitacre, Ca. Temp. King 15. 61. Whelpdale v. Cookson, 1 Vez. 9. Crowe v. Dallard, 1 Vez. J. 215. Campbell v. Walker, 5 Vez. J. 678 to 682. Ibid. ex parte Reynolds, 707-8. This last case, which also refers to ex parte Hughes & ex parte Dumbell, 6 Vez. J. was this: An assignee under a commission of bankruptcy, purchased the estates of the bankrupt at auction; they were ordered to be resold, from this general principle, that an assignee could not be a purchaser. Here the characters of trustee and cestui que trust were united, yet held that no purchase could be made, the permission of a court of chancery being necessary to sanction the transaction. In the case now before the court no purchase could be valid, because the power under which the sale was made, had determined by the death of the grantor. Co. Litt. Sec. 66. "If a man maketh a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed, yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing." The power was there collateral to the land, and so here; for it goes to the executors of the mortgagee, while the land would descend to

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nel, 1 Vern. 488.

† The only point in that case relating to trust is, that if a trustee of a term surrender and take a further term, it shall be for the benefit of the cestui que trust.

‡ An executor, trustee, renewed a lease in his own name, and after mortgaging it, assigned the equity of redemption to a trustee to pay his own debts. The trustee sold to a purchaser with notice of the original trust, the purchase set aside.

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* But the heirs of the mortgagee would be merely trustees for his executors, *Ellis v. Guavas*, 2 Ch. Ca. 50. *Tabor v. Grover*, 2 Vern. 367. *Wood & al. cited*, 2 Vern. 193. *Turner v. Crane*, 1 Vern. 170.

his heirs *. It was therefore a mere legal authority, between which and a power there is a technical distinction. These latter took their rise from, and were created by the statute of uses. Allowing however that the power did survive, it ought to have been strictly pursued, and every exception in the articles exhibited at the time of the auction, was, if not a fraud, at least a violation. None of the cases cited touch the present; *Lockwood v. Ewer* was a case of a mortgage of stock. The determination was, that on such an interest there was no equity of redemption. In the other case cited, there had been a lapse of thirty years after foreclosure. *Tooke v. Hartley*, was a case of a lease for years, and there the foreclosure had destroyed all privity between the parties.

Troup and Benson in reply. A principal question is, have the statutory provisions regarding the sale under the mortgage been complied with? All acts in *pari materiâ*, are to receive a similar construction. The laws of '74 and of '53 are in *pari materiâ*. In that of '53, the words registering and recording are used as synonymous; therefore in that of '74 they must be considered as synonyms. The act is silent as to the book where these powers are to be recorded, and as the provision must be for the information of persons wishing to purchase, convenience requires it should be in that book where the mortgages are registered. The contemporaneous exposition, and the communis error relied on, are in favour of this position; for by a certificate from the clerk of the county in which the mortgaged premises lie, but one instance is found of the mode contended for by the respondents; whereas, twenty and upwards occur of that for which we insist. The advertising the notice for six months is well proved, though the papers in which it appeared are missing; for when written evidence is lost, the resort is always to parol. The exceptions were all in favour of the mortgagor, for what was excepted now remains; and as to the corn, &c. the lands were in the hands of a tenant, who, though his tenancy was at will, could not be deprived of his emblements, on the landlord's determining the tenure. The main question however, for all the others are but of minor importance, is, whether the power to sell contained in the mortgage, was revoked by the death of the mortgagor? The rule is, that a naked authority is revoked by the death of the donor; but

an authority coupled with an interest, survives to the donee. A naked authority is one granted without consideration, vesting no interest in the donee, and to be exercised for the benefit of the donor. This is the kind liable to be revoked by him, and expiring on his decease. The authority in this case is of a different kind. It is founded on a valuable consideration paid, vests an interest in the mortgagee, and for his benefit it is to be exercised. This is the species which cannot be revoked. A mortgage gives a conditional estate in fee simple. To render it absolute, it was necessary to recur to chancery. This being attended with expense and delay, was thought a grievance, and to redress it, the power of sale came to be inserted. It is, therefore, nothing more than the grant of a special action to compel payment of the money, and this for a valuable consideration. If a special action or remedy be given, it carries to the donee an interest to effect the object of the grant, which was *here*, to raise the money due to him in a summary way. It becomes, therefore, a part of the original contract, and is parcel of the security itself. As such, it cannot be revoked by the donor. If it could, he would be able to act against, and defeat his own grant. From this he surely ought, by his own deed, to be estopped. As it is purchased for a valuable consideration, it must survive; for no grant of an interest to a grantee can cease to operate by the death of the grantor. The mortgage works as a conditional conveyance in fee simple. The office of the power is to change the estate into an absolute fee. Where an estate is created with a power to enlarge that estate, can it be viewed in any other light than as a part of that estate? It is co-existing and commensurate with the estate—necessarily, therefore, an authority coupled with an interest, which of course survives. In the position cited from Co. Litt. the letter of attorney was to a third person, without consideration: here it is to the mortgagee himself, purchased and paid for by him. Besides, the power to give livery must, like a warrant of attorney to confess judgment, be executed in the name of the grantor; which, after he is dead, cannot be done. This is not the case with the power in a mortgage; for the legal estate being in the mortgagee, the conveyance is in his name. The reason why it is to him and his executors, is because the mortgaged premises are considered as personal estate. The Eng-

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* But note, that in England the power of selling irredeemably without the intervention of a court of equity, is doubted. See 1 Pow. on Mort. 14.

lish jurisprudence furnishes nothing analogous to these powers. But even under their system it has lately been the practice to convey the mortgaged premises to trustees, in trust after forfeiture to sell for payment of the mortgage money. The principle with them is the same as with us, to save the expense of a chancery suit*. Our statute must be so interpreted as to render the sale it authorizes effectual. If the mortgagee has not the right to fairly purchase, it would be defeated. It is often for the interest of the mortgagor that the mortgagee should buy. Should only one half the money due be offered, and he be restrained from bidding, the person of the mortgagor, if alive, would be liable; if dead and insolvent, must the mortgagee stand by and lose his money? To impeach a purchase by a trustee, fraud, or making a profit, must be shown. 3 Vez. J. 749, the chancellor, speaking of this rule against permitting trustees to purchase, says, "I do not recollect any case where the mere abstract rule came distinctly to be tried, abstracted from the consideration of advantage made by the purchaser. It would be difficult for such a case to occur; for, unless advantage is made, the act of purchasing will never be questioned. The rule is laid down not very correctly in most of the cases where you find it. It is stated as a proposition, that a trustee cannot buy of a cestui que trust. Certainly that naked proposition is not correctly true." The full value was given here, as appears from the testimony. The reason why redemptions of mortgaged premises are so much favoured in England, does not apply to this country. Their lands are under rent, and produce an annual value. Ours afford no advantage, but from the enjoyment of the property itself. It is, therefore, a matter of easy calculation, to know when an estate can redeem itself, and whether worth more than the sum due. To discharge land from a mortgage, we have no mode but by a sale of the land itself. This is contemplated by the parties at the time of their original contract, and was the cause of introducing the power now in question. The case cited from 5th Vezey, J. is not applicable to the present. An assignee under a commission is not a trustee for himself only, but for others also: when he purchases, he therefore will not be permitted to exclude the other cestui que trusts from the benefits which they may have a right to. They say, "as you purchased to save yourself, you must do it for us too." But had the purchase

been on behalf of all the creditors, it could not have been disturbed; for the bankrupt, it is to be remarked, was not the party who complained. A strong argument against the decree, is the impossibility of going into an account of the labour, improvements, and expenses of the mortgagee.

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Per curiam delivered by Kent, J. This case comes before the court on an appeal from a decree of the court of chancery, that the respondent be permitted to redeem. The reason assigned for the decree was, that the power to sell expired with the life of the mortgagor. This doctrine, if sound, renders it unnecessary to discuss any of the other points. If the power was extinct, the sale was null, and the right of the respondent to redeem exists in full force. It is proper therefore to turn our first attention to this point; and, although my examination of it has led me to a different conclusion, I have made it with the deference and respect due to the court which pronounced the decree. It is admitted that a naked authority expires with the life of the person who gave it; but a power coupled with an interest is not revoked by the death of the grantor. In my opinion the power contained in the mortgage is of the latter description. A power simply collateral and without interest, or a naked power, is, when, to a mere stranger, authority is given of disposing of an interest, in which he had not before, nor hath, by the instrument creating the power, any estate whatsoever. But when power is given to a person who derives, under the instrument creating the power, or otherwise a present or future interest in the land, it is then a power relating to the land. These last powers are subdivided into powers annexed to the estate, and powers in gross. Both are considered as powers with an interest, because the trustee of the power has an interest in the estate, as well as in the exercise of the power. If, as one of the old cases expresses it, the person clothed with the power hath at the same time an estate in the land, the power is not collateral, because it savours of the land. The power now in question answers exactly to this definition of a power with an interest, because the mortgagee has at the same time a vested estate in the land, and it does not answer at all to the definition of a power simply collateral; for that is but a bare authority to a stranger, who has not, nor ever had any estate whatsoever. I might, perhaps, rest satisfied with giving this description of the two powers, drawn from approved authority;

Co. Litt. 52. b.
1 Sid. 6.

Vide Powell
on Powers, 8.
10. 12. But-
ler's note, 298,
to lib. 3 of Co.
Litt. Hale,
Ch. Baron.
Hard. 415.

Hardress, 415.

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 Co. Litt. 113. a. 181. b. 236. a. 3 Salk. 277. Pow. on Devises, 291 to 310.

but I think the point is susceptible of more precise and definite illustration. If a man, by his will, directs his executors to sell his land, this is but a bare authority without interest; for the land, in the mean time, descends to the heir at law, who, until the sale, would at common law be entitled to the profits, and, being but a naked authority, if one executor dies, the power at common law would not survive*. But if a man devises his land to his executors, to be sold, then there is a power coupled with an interest; for the executors, in the mean time, take possession of the land and of the profits. In this case, as the estate, so also the trust, would survive to the surviving executor. There is a very striking analogy between this case, of a devise of land to executors to be sold, and a mortgage of lands with a power to sell. In both cases, the estate passes to the person clothed with the power, and in both cases the power is given in trust, to answer a specific purpose. I cannot discern any distinction between the cases, sufficient to render the power in the one instance naked, and in the other coupled with an interest. It is not a power with interest in the executors, because they may derive a personal benefit from the devise; for a trust will survive, though no ways beneficial to the trustee. It is the possession of the legal estate, or a right in the subject, over which the power is to be exercised, that makes the interest in question; and where an executor, guardian, or other trustee, is invested with the rents and profits of land for the sale or use of another, it is still an authority coupled with an interest, and survives. It has been thus frequently adjudged. This case also is still more analogous to the one of a conveyance of property by way of pledge, or in trust, with an agreement for the mortgagee to sell in case of default. This is a practice known in the English law, and it was taken for granted by the lord chancellor, in the case of Tucker, administrator, vs. Wilson, that where there existed such an agreement, the mortgagee might sell after the death of the mortgagor. It seems to have been admitted, not to have been competent for the mortgagor to revoke this authority to sell, because it was granted for the benefit of the mortgagee. He might perhaps embarrass the execution of the power, by a subsequent mortgage or judgment, but the power would still remain in full force, although the land, in the hands of the purchaser under the power, might become subject to such subsequent lien. In short, this power is

1 P. Wil. 261.
 1 Bro. Par. Ca. 494. It was a case of absolute conveyance of stock to secure money lent. In all such cases, foreclosure is unnecessary, a sale of the stock being exactly the same thing. Lockwood & al. v. Ewer, 2 Atk. 303.

* See the note (2) of Mr. Hargrave on this point, in Co. Litt. 113. a.

altogether different from that of a mere naked authority: the latter is no better than a letter of attorney given to a stranger to the estate, as in the instance given by Coke, of a letter of attorney to make livery of seisin. This is revocable by the grantor at his pleasure in his life time, and is absolutely revoked by his death. The grantee of such a naked power, having no interest connected with the power, has, of course, no interest affected by the revocation. The present power is in every view distinct from the other. I conclude, therefore, that the power to sell was not revoked by the death of the mortgagor, and that the decree cannot be supported on the ground that was taken in the court below. I have bestowed some pains upon this question, because I am of opinion that the grounds of a definitive decree in chancery, resting upon what is assumed to be a principle of law, ought not to be questioned and overturned without much care and consideration. It remains to see whether any of the other points, that were raised by the counsel upon the argument, will bear out the decree. It is contended, that the power was not recorded according to law. The act directs, that all powers to mortgagees, for making sales in fee, shall be acknowledged, proved, and recorded as other deeds usually are, before the conveyances for the sale be executed. I incline to think the act was complied with. The power was registered in the book of mortgages. The subject matter of the whole act is mortgages; and, in the preceding part of it, it speaks of deeds with a defeasance in a separate writing, and of conditional deeds, and declares them to be the same as mortgages. It is no violent construction, therefore, to consider the words, recorded as deeds usually are, to refer to mortgage deeds, they being the only deeds within the purview and other provisions of the act. These powers also are usually contained in the same deed with the mortgage, and to register the mortgage part of the deed in one book, and the power part in another book, would be inconvenient and idle. Admitting the proper book to have been selected, the power was well recorded; for it was recorded at length, as far as the mere power in question went, and nothing was omitted but the covenant at the foot of it, declaring the sale to be a perpetual bar. But if this be not the true construction of the act, I am satisfied that even the omission to record the power will not affect the sale. The only use in recording it, is for the benefit of the purchaser, and

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1 Inst. 52. b.

Laws of N. Y.
vol. i. Appen-
dix, page 10.
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it does not lie with the mortgagor to object to the validity of the sale by reason of that omission. He can have no concern or interest to be affected, whether it be recorded or not. The next objection is, that the notice of the sale was not according to the directions of the act. It is alleged, that the proof of the six months' notice in the news-paper, and on the court-house door, is not as it ought to be, full and perfect; and some nice criticisms have been made upon its deficiency. I shall forbear entering into this examination. Considering the lapse of time since the publication was made, the proof of the notice is pretty well made out, and every defect may well be supplied by a reasonable presumption. I have, however, a short decisive answer to the whole objection; and that is, that after a mortgagor or his heir has lain by for 16 years, he shall not then be permitted to come in and question the regularity of the notice. Public convenience essentially requires that we should establish this principle. It would be too rigid and severe to exact all these minutiae of proofs, after such a length of time. It was next urged, that the exceptions made and published in the conditions of sale, rendered the same void. The exceptions which have been deemed as of serious moment, (for I pass by the exception of the corn on the ground, and the 100 rails, as not requiring an answer) are, a drain for the collect of 10 feet wide, and certain terms imposed on the purchaser, who could not give sufficient security. I am not inclined to question the doctrine, that a mortgagee is bound to pursue his power strictly, and that, although he may sell part of the land at one time, and part at another, yet that he cannot clog and incumber the part that he sells, but must sell simply and unconditionally the whole interest, as the same was conveyed by the mortgagor. I cannot however intend, that this principle was violated in the present case. The exception of the 10 feet may, or may not, have been an incumbrance to the premises. It could not have been made, or intended as a benefit to the mortgagee, who became the purchaser; for the premises, it appears, were not bounded upon him. He could have had no motive. For the drain being excepted from the sale, would, if created then for the first time, have remained in the heir of the mortgagor, and it must still remain his property. I think, however, we ought to intend, after this distance of time at least, that this drain had antecedently existed, and was founded on usage, or was an ex-

Co. Litt. 113.
a. 1 Co. 173. b.
Digges' case.

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ception in the previous deeds of the land. It is more probable then, *that* exception was put in for greater caution, and that the mortgagee himself had taken the premises subject to that exception. It would be unreasonable and impolitic, in my opinion, to disturb that sale at this day, by reason of a circumstance of such small moment, as a matter of fact, in which no fraud or gain can be imputed to the one party, or real injury to the other; and when, by fair intendment, the whole can be so easily reconciled with strict principle on the subject. The other objection is, that, by the conditions of sale, unreasonable terms were imposed on the purchasers, who could not give sufficient security. These sales at auction may be insisted on to be cash sales. The mortgagee may have his conveyance ready to execute, and may exact the money as soon as the land is struck off. If he is willing, however, to allow a credit to the purchaser, and if he be entitled to allow it, he may then, no doubt, dictate the terms and extent of the security, so as the same be not unreasonable. If the purchaser is not satisfied with these terms, he has only to advance the money which the mortgagee is entitled to demand, and if offered, bound to receive. But whether the mortgagee be entitled to sell upon credit and security, or is in all cases bound to exact the money immediately, it is unnecessary to decide; because the sale in question was not a sale upon credit, but a sale equivalent to a cash sale, since it was in reality a sale to the mortgagee himself. If he could not have sold upon security, but for cash only, these terms that were given out were null and void, and could have had no effect upon the sale, or upon the purchasers; and if he was entitled to sell on credit and security, I should not consider the terms imposed to have been so unreasonable, as that the sale ought now to be set aside, from that circumstance alone. I do not, therefore, consider these conditions of sale as forming any solid ground for the present bill, to set aside the sale and redeem. Another objection to the sale is, that the mortgagee was himself the purchaser; and it is a sound and established rule of equitable policy, that a trustee cannot himself be a purchaser of the trust estate, without leave from chancery; and the reason of the rule is, to bar the more effectually every avenue to fraud. This rule was recognized by this court in the cause of *Munroe and others, vs. Allaire*; but a distinction was there taken between the case of a suit against a trustee

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5 Vez. J. 680,
681, 2.

5 P. W. 287.
3 Bro. 641.

1 Bro. Par. Ca.
414. 2 Eq. Ca.
Abr. 177, S. C.

tee, to set aside a purchase, he having procured the formal legal title, as in the present case, and where a suit was by him commenced to complete his purchase, as in the case cited; and it was observed, that in the former case, and the observation is consequently applicable to the present case, that equity would not interfere as of course, to set aside the purchase; for although equity will not aid, it is not bound in every case to disturb such a purchaser. It has also been made a question, whether the rule would apply to the case of a trustee, who was himself a cestui que trust, and was obliged to purchase, in order to avoid a loss to himself by a sale at a less price. But I shall forbear for the present from giving any opinion, whether these distinctions are well taken or not, because the rule being admitted to be absolute and universal, it is still agreed, that the cestui que trust must come in a reasonable time to set aside the sale, or he will not be heard. What shall be termed a reasonable time, is not susceptible of a definite rule, but must, in a degree, depend upon the circumstances of the particular case, and be guided by sound discretion in the court. In this case, the cestui que trust comes after 16 years, finding it a gaining bargain, and being, all that time, under no legal disability. Is this coming within reasonable time, to set aside a sale on the ground of this technical rule of equity? Suppose the mortgagee, instead of selling the lands, had entered into possession of them, under the mortgage, and enjoyed them as his own: 20 years possession in such a case would have been a bar to a bill to redeem. This is a settled rule in chancery. And ought not 16 years possession, after a sale according to the directions of a statute, and which is a species of foreclosure by law, to be esteemed equal to 20 years possession, commencing without such solemnity? In the case of *Wichalse, executor, vs. Short*, the party came into chancery to redeem 11 years after a foreclosure, and that too on the ground of a parol declaration of the mortgagee, that he was willing to receive back his money; but the court of chancery held, (and the decree was affirmed in the house of lords) that the mortgagor came too late after a lapse of 11 years, and that it would be a bad precedent to open the foreclosure, as it would render the property, acquired under such circumstances, extremely precarious, and would be attended with mischievous consequences to the mortgagee, who, in the mean time relying on his title, had improved the estate, and

kept no account of the rents and profits. Such a practice would shake an abundance of titles. In the case, likewise, of *Lants v. A. and W. Crispe*, a rule to redeem was refused, after the mortgagor's acquiescence for six years, under a foreclosure by his own consent. These cases are certainly not stronger than the present, and I think the acquiescence of the cestui que trust in the purchase by the mortgagee, and which is necessarily presumed from his delay, ought now to conclude him. The allowing him to redeem, would establish a precedent much more impolitic, and inconvenient in its consequences, than the violation, in this case, of the rule, that a mortgagee shall *not* purchase. I conclude, therefore, under the circumstances of this case, none of the objections raised are sufficient to justify the setting aside the sale of 1784, and consequently that the decree of the court of chancery ought to be reversed, and that the bill below to redeem, be dismissed with costs.

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2 Bro. Par.
Cases. 111.

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IN error, on a bill of exceptions to the supreme court, in an action on a policy of assurance upon the brig *John*, valued at \$5000. The vessel had been captured on the 19th of January, acquitted on the 20th of February, and restored to the captain with freight amounting to \$2000. He then refitted and repaired her at an expense of only \$800, and proceeded on his voyage. On the 5th of March, the assured, being unacquainted with the restoration of the vessel, abandoned; after this, the *John* arrived, and, on a tender to the underwriters, being refused by them, she was sold by the assured, who, with the money in their hands, brought their suit against the plaintiff for a total loss, averring it by capture. Mr. Justice Radcliff, before whom the cause was tried, charged that as the assured were on the fifth of March, when they abandoned, ignorant of the fact of restoration, which took place on the 20th of February preceding, they had a right to abandon, and claim for a total loss: That being so entitled, they were by law warranted in demanding the whole amount, without deducting any thing for the proceeds of the brig.

On a capture, restoration, and abandonment, the fact of restoration, tho' unknown at the time of abandoning, takes away the right of abandonment and claim for total loss. The assured, under such circumstances, being entitled to recover only according to the final event.

Pendleton for the plaintiff. The questions arising on this case are, whether an abandonment can be made, after a resto-

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ration in fact, though the assured be ignorant of such fact at the time of abandonment made? Secondly, whether, allowing the abandonment could be made, the assured in this case ought not to set off, or deduct from his demand the amount received from the sale of the brig? As to the first question, it is to be considered that a policy of insurance is not a contract against this or that event, but against loss. It engages for nothing more than an indemnification. If the loss be total, the whole sum insured will be the amount of compensation; if it be but of a part, a partial recompense only can be demanded. From an equitable construction of the instrument, a loss is allowed to be total, when more than half the subject matter of insurance has been destroyed, or the voyage totally defeated. This has given rise to the doctrine of abandonment, on making of which the property saved is relinquished to the underwriter. If a capture takes place, the uncertainty whether the whole will be actually lost or not, admits of abandoning; but when the property is released, this conclusion fails. When therefore it is in the possession of the owner or his agent, the loss incurred is no more than what is paid for its recovery, or in expenses on it. The result is, that while the capture continues, the right of abandonment exists, and if then made, the underwriter must pay the whole amount, and take the chance of the property being afterwards recovered. But if the property be restored previous to abandoning, then the fact of loss has ceased, and the only claim can be for the injury sustained. It is the fact which gives the right of abandonment: if there is no existing fact, there can be no right; and if no right, no abandonment. The loss must continue to the time of abandonment made. In *Goss v. Withers*, 2 Burr. 696, Lord Mansfield is made to declare, "there is no book ancient or modern, which does not say the assured may, on a capture, abandon and claim as for a total loss." But on explaining these very words in *Hamilton v. Mendez*, 2 Burr. 1212, his lordship says "The proposition was applied to the subject matter," and in pronouncing the judgment of the court in this last case, he lays down these principles: "The plaintiff, upon a policy, can only recover an indemnity according to the nature of the case at the time of the action brought, or (at most) at the time of his offer to abandon." In *Mills v. Fletcher*, Doug. 219, and *Cazalet v. S. Barbe*, 1 D. & E. 187, these cases are referred to and ac-

knowledge. *Roccus*, No. 50, cited in *Park*, 144, is to the same effect. So is 2, Val. 143. Nay, he thinks payment of the money should be the only criterion. In *M'Masters v. Shoolbred*, and *Furneaux v. Bradley*, *Park*, 166, the same doctrine is maintained. The right of abandonment cannot depend on an erroneous opinion. For the belief of a fact to exist, when that fact does not exist, can never give a right against the truth of the case. It is the final event which ought to regulate; and if on that it proves a partial loss, the recovery cannot be for a total. On the second point, if the abandonment is valid, the money received by the assured must belong to the underwriter, and be an extinguishment of the defendants' demand to the amount of the sum received. For if insurance is a contract of indemnity respecting a particular thing, and the produce of that thing be received by the underwritten, the difference between the produce received and the value insured, is all the injury that can have been sustained. In *Pringle v. Hartley*, 3 Atk. 195, it is laid down that the value saved, if in the hands of the assured, must be deducted from the recovery on the policy; but if none has come to his hands, the jury cannot take any notice of it. It follows therefore that what has come to his hands, they must notice.

Henry and Caines contra. The effect of the argument on the first point is to prove, that, though an abandonment has been made instantly on the knowledge of a capture, yet if at the time of abandoning there has been a restoration, it does, though unknown, avoid the abandonment, and the assured can recover only for a partial loss. An abandonment, in its very nature, contemplates restoration or recovery. When all is gone, an abandonment is an absurdity*, and therefore in cases of absolute total losses, an action may be brought for a total loss without abandoning. It is singular that the existence of that, on the supposition of which the whole doctrine of abandonment is founded, should take away the right to abandon. This is to make the cause destroy the effect. Abandonment is the exercised right given to the insured by his policy. It is his exercised right, because not obliged to make it. *Marsh.* 511. 513. On the happening of the accident insured against, he is entitled to exercise this right. The contract of the underwriter is to indemnify against certain perils and losses, of which capture is one. The nature and effect of capture, is to induce a *primâ facie*

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total loss, and enable the assured to recover for such. Marsh. 483, *Goss v. Withers*. 2 Burr. 696. This arises, not only from the words of the contract, but the reason of the thing; for, on a capture, all the dominion and power of the assured over the object of his insurance is gone. The *spes recuperandi* does not suspend the right to demand for a total loss, and complete justice is done by putting the underwriter in the place of his insured. Per *Ld. Mansfield*, 2 Burr. 697. That a restoration, prior to an abandonment, takes away the right to abandon, proceeds on the idea of restoration constituting a part of the contract. This is not so. The contract is against the happening of certain events. On the taking place of any one of these, the contract is broken, and on the breach arises the right of the assured. To argue that a fact not mentioned shall heal this breach, is to say that a contract, broken on an event contracted against, shall be restored by an event not contracted for; that what is expressed, shall be controlled and annulled by what is not expressed, and this in subversion of the maxim of *de non apparentibus, et de non existentibus eadem est ratio*. Capture gives the right to abandon; all that is required is, that it be asserted by the assured speedily, and so soon as he receives the information of his loss. *Mitchell v. Edie*, 1 D. & E. 608. Marsh. 510, 11, 12. *Alwood v. Henkle*, *ibid.* 513. When thus asserted, it has relation to the period when the accident happened. Marsh. 519. Without this construction, the right of abandonment would be perfectly illusory. Suppose a capture in the East-Indies, and the vessel carried into Calcutta. Six months may elapse before information of the event is received. Must another six months pass over before the assured can be certain of his right? It is the capture, or *casus*, which gives it him. Election and notice are assertions of that right, which render it vested in him, and absolutely change the property to the assurer, whose agent the assured from that instant becomes. The effect of election, as to the vesting of rights, is not confined to cases of insurance; it is to be traced in every part of our law. If a contract be dependent on an agreement, and the party for whom intended disagree, it can neverafter be affirmed. *Whelpdale's Case*, 5 Rep. 119. For where a right is vested, nothing but the act of the party can divest it. If A. is in execution at the suit of B. and I. S. desires B. to let A. go at large, and he will satisfy the debt, to which B.

agrees; though I. S. before any thing done in pursuance of this promise and agreement, comes to B. and tells him, that he re-wakes his promise, and that he will not stand to it; yet such re-vocation cannot be pleaded in bar to the action. 1 Roll. Abr.

32. The reasoning is, that, by the election to accept the offer of I. S. a complete right vested in B. on the contract of I. S. So here, the contract of the insurer is for a certain sum, to pay on a certain event, if the insured elect to demand. On this election made, every ingredient for a perfect vested right occurred. There was the consideration, in the premium; the promise, in the contract; the breach, on the accident; the right, on the election duly noticed. On the sacredness of vested rights, those of property in a great measure depend. A contingent remainder may be destroyed whilst contingent; but the instant it vests, the act of the party is necessary to affect it. After breach of the condition of a bond, the tender of principal and interest, and refusal by the obligee, cannot, by the common law, be pleaded in bar to the action. Underhill v. Mathews. Bull. N. P. 171. Because the breach vested the right. The only restriction of the right to abandon is, "that when information of the loss reaches the assured, they must make their election, whether they will abandon or not." Pr. Buller, J. in Mitchell v. Edie. Hamilton v. Mendes proves only that the assured cannot abandon, when the information of capture is accompanied with information of restitution and safety. The case was nothing more than an equitable exposition of the contract of insurance, made in the same spirit as that which influenced our legislature in the act for the * amendment of the law. For, as this was passed to soften the rigour of the common law on a breach of the condition in a bond, so the judgment in that, was to temper the strictness of legal construction on policies of insurance, in cases exactly similar, and is no further applicable. It is a mitigation of strict insurance law; it qualifies the right by the knowledge of the fact of restitution. If the insured, at the time of abandoning, is ignorant of any fact that can restrain or qualify his election, it must be considered as made in pursuance of the right arising from the capture. To test the right to abandon, by the facts in the knowledge of the assured, when the abandonment is made, is the best rule. First, from the nature of the right. It is to transfer the property to the insurer for its value, that he, as the insured

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has lost his dominion over it, might pursue his own course for its recovery, and not be liable to be called on for average losses incurred by the conduct of another. Secondly, from its end. It is to encourage commerce; to enable the party, without any incumbrance from the difficulty of recovery, to be, at the end of thirty days after proof of loss, in possession of his funds, and employ them in other mercantile adventures. Thirdly, this end is defeated, if any hope be left in the insurer to convert, by delaying to acquiesce, the total into a partial loss. If the facts known at the time of abandonment, are not made the criterion of the right to abandon, advantages are given to the insurer over the insured. The latter is bound to make his election immediately; the former, after delay, and finding the state of the market, would acquiesce or not, according as prudence and interest might dictate. The opinion of Valin, in his 2d vol. pages 143-4, has been cited as to the effect of subsequent events, on a prior abandonment; but in the notes to a former page in the same volume, he himself cites a French decision, to the contrary of what he lays down. Emerigon, a weightier and more recent authority, in his 2d vol. ch. 17, sec. 6, answers the points insisted on by Valin, and is clearly against them. Where a person has been legally authorized to act, what he does in virtue of that authority, though after it has determined, cannot, if bona fide, and without knowledge of the determination, be on that account impeached. A conveyance under a letter of attorney revoked, is good, if without notice of revocation. To permit, in the present case, the subsequent fact of restitution to invalidate the abandonment, will be to affect with notice when a want of knowledge is confessed. The state of things at the time of suit brought, has been mentioned by lord Mansfield, as showing it must influence, from analogy to the cases of actions for waste, and against sureties. In the first instance relied on, the repairing before suit brought, is a bar, because there must be a view to judge of the waste, which, by the reparation, is rendered impossible. 5 Rep. 119, Whelpdale's case. But even then it must be specially pleaded. 1 Inst. 282. With regard to suits against sureties, the *casus fœderis* is indemnity alone. But this very point relied on in the argument of this day, by the opposite counsel, was urged and decided in the case of *Storey v. Brown*, cited in 5 Bro. Pa. Ca. 139, in notis. The vessel was insured to Gibraltar, for

which place she was chartered. She arrived there, was captured, proceeded against, and restored to the captain, who went on another voyage in her. In an action against the underwriter, he relied on there having been no total loss, and the restoration to the captain as the agent of the insured, and by him sent on another voyage. But it was answered that the capture at Gibraltar was a breach of the policy, and the plaintiff had judgment for a total loss. After capture, the master is the agent of the underwriter; a restoration to him is therefore a delivery to the underwriter, and this can never defeat a right of the underwritten. The same point was determined in the supreme court of this state, in the case of *Murray v. United Insurance Company*; and in *Slocum and Burling* against the same, it was thought so clear, that the counsel for the defendant did not attempt to argue it. In this last case, the vessel was in port when the action was brought. On the second point, we do not deny that the amount of the proceeds of the vessel belongs to the plaintiff, nor that the defendants are trustees for him; but under a plea of the general issue he can have no advantage of it. Under that, nothing can be received in evidence but payment, Bull. N. P. 152-3, unless notice of set-off had been given under the statute.

Harison in reply. The engagement of the contract of insurance, is not to pay the full amount of the policy on the happening of any one of the events contracted against. It is to indemnify for the damage of that occurrence. Were it otherwise, there could be no partial losses. It is not therefore correct to say, whenever an accident happens, there is a vested right to claim for a total loss; for the question instantly arises, what is the extent of the injury in consequence of the accident? Most certainly, when there is a calamity which creates a total loss, there is a breach which gives that vested right insisted on. But the question on every accident is, is it an average or total loss? and this is always a subject of legal consideration. Whatever does not go to the total destruction of the voyage, is an average loss. Marsh. 506. Thus, temporary detentions and repairs are average losses, and on payment of the expenses incurred, the contract is complied with. Detention, and capture, as a species of detention, may be total losses, but then they are only technically so, and when they no longer continue, cannot be so considered by the insured. He cannot, when this artificial loss is done

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away, act upon it as a total loss which abides for ever, and abandon by force of the *casus*, when the *casus* is passed. The right of abandonment, in cases of technical loss, must depend on the fact of its existing when the abandonment is made. This doctrine cannot be inconvenient in its application; if any considerable delay take place by the capture, it will always furnish time to abandon whilst it lasts. On the contrary, if every little interruption is to enable the assured to turn the loss on the underwriter, it will open a wide door to fraudulent practice. The cases in Great Britain, and even in the supreme court, are not authority here; for, it is against that very authority we now apply. This is the highest branch of our judicature, and as the point has never before been here agitated, it is open for determination. In making it, the English books furnish but few decisions; for the first case on the subject of abandonment, is that of *Goss v. Withers*, in 1757. It however confirms our positions, and expressly lays down, that "no capture by the enemy can be so total a loss as to leave no possibility of recovery." The authorities adduced by the associate counsel who opened this case, all show the loss must continue to the time of abandoning, and perhaps to that of action. The case from *Brown's Par. Rep.* was on a *wager policy**, and in them, as there is no interest, there cannot be any abandonment. The mere accident, therefore, on a *wager policy*, gives that vested right which has been so strongly insisted on. *Pringle v. Hartley*, is decisive on the second point.

* It does not appear so from the case, unless the words "valued at the sum insured," will create a *wager policy*, for which neither in *Park* nor *Marshall* do I find an authority.

The case of *Hallet v. Peyton*, standing next in order, and embracing the same point as to abandonment, the court declined pronouncing judgment till that should be argued.

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S. P. as the preceding case.

THIS case also came before the court on a bill of exceptions. The points relied on were, 1st, That the seal of a foreign vice admiralty court was not in itself any evidence; but, to make it so, required testimony on oath authenticating both the seal and the signature of the judge. 2d, That, of the certificate of registry, parol testimony could not be received, it being, under the act of congress, a record. The third was as to abandonment,

and the same as in *Church v. Bedient*, the next immediately preceding case.

Pendleton for the plaintiff. It is unnecessary to argue one of the exceptions, because the judge against whose opinion the bill was sealed, has acknowledged that he erred in admitting parol proof of the existence of the register. The second is of the utmost importance. Upon this we contend that the papers adduced could not be legal evidence, unless accompanied by proof which would authenticate the seal of the court, and hand of the judge, or show that the condemnation was a true copy of the original sentence. It may not, perhaps, be requisite to establish by witnesses, the contents of papers under the seal of a foreign court, and under the hand of the judge who presided in it, as to the facts which took place in such court; because it may be presumed that no judge would put his signature to an untruth. But whether it be his signature and the seal of his court, must be authenticated by testimony. The reason why seals of any courts are evidence, is because our own judges are presumed to be acquainted with them. This presumption is not extended to foreign tribunals, nor to their laws, which must be proved*. To allow foreign seals to prove themselves would open a wide field to fraud. In a case in *Espinasse*†, want of seaworthiness was not allowed to be proved by a copy of a survey. The act of congress, regulating the manner of authenticating records of judgments in sister States, is a high legislative authority to show a seal of a foreign court cannot be received in evidence, without proof of its being actually the seal of such court. Were it otherwise, the act would have been needless. If this is the case in regard to seals of the courts of the different states, it certainly will a fortiori be so in regard to seals of foreign admiralty tribunals. Even in Great Britain, the seals of their inferior municipal courts must be proved, for they are not in themselves any evidence. Gilbert's Law of Evid. by Loft, 22, shows, that seals of inferior courts must be proved by the oath of some persons to whom they are known. In *Olive v. Gwin*, Hard, 118, the seal of the grand sessions in Wales, was held no evidence, though the grand sessions is a court established by act of parliament. So in *Green v. Proude*, 1 Mod. 117, an exemplification of a recovery in ancient demesne, was held inadmissible without proof. An exemplification under the public seal of a foreign city was reject-

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* Boehtlinck
v. Schneider,
3 Esp. 58.

† Wright v.
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Esp. 709.

ALBANY, 1804. ed, when offered to establish the entry of goods at the custom-
 house. The King v. Mason, 8 Mod. 75. Nay, in Henry v.
 R. S. Hallett, Adey, 3 East. 221, it was held that proving the hand-writing
 of the judge was not sufficient in an action on a judgment rendered in Grenada, but that the seal ought also to be established. If this strictness will be required in England respecting the seal of a court in one of her own colonies, we ought to be still more strict here. In Bernardi v. Motteux*, the court refused to allow proceedings of a foreign admiralty court to be read unless by consent. The reason is evident; they were not authenticated. We do not say the papers adduced shall in no case be evidence; we only insist they must be substantiated on oath, as copies of other writings are, when the originals cannot be produced, and if produced would be evidence. The true criterion as to seals of courts is, that where the law presumes them known to the judges, they prove themselves; where not, they must be proved. The point of abandonment has already been argued in the preceding cause; if on that we are correct, the judgment in this case must be reversed, however the court may think on the other exceptions.

* Doug. 574.

Caines contra. As the questions now made, come before the court on a bill of exceptions, it may not be amiss to advert to the nature of this mode of proceeding. In jury trials when a party denies a fact, he controverts it by evidence which goes to the jury. When he admits a fact to exist, but says it is not substantiated in the manner required by law to prove the issue, he excepts to the evidence, by insisting it cannot at that time, or in that way, be offered to the jury in support of the fact in issue. When a fact is admitted, and also that it is duly substantiated, and a party contends that though the fact is true, and well proved, the inferences from it, do not in point of law, maintain the issue, he demurs to the evidence. From hence it appears, that on a bill of exceptions, the person tendering it supposes the evidence true, but questions the competence or propriety of it. Money v. Leach, 3 Burr. 1765. Therefore the facts it contains can never afterwards be disputed*. Show. Pa. Ca. 120. Bridgman and others v. Rowland Holt, and others. It follows also, (though the remark is not required by the present case) that on a demurrer to evidence, the court may make any and every inference which a jury might have drawn. Cocksedge v. Fanshaw, Doug. 131. 134. Here then the cap-

* This may perhaps be, because it is an acknowledgment on record.

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ture, the condemnation, and the seal, are confessed, but the reception of them in evidence is denied, for want of being duly authenticated. The question then arises, whether a seal, purporting to be a seal of a foreign court of admiralty, shall be *prima facie* evidence, without parol testimony of the seal and the signature of the judge? As conclusive it was not offered. As *prima facie*, it was open to be rebutted: it is only in case this is not done, that it becomes of any avail. But its reception is argued against, from the danger of fraud to which it would expose, as seals and signatures might be counterfeited for every occasion. It may be answered that the difficulty of manufacturing seals, papers, and proceedings, with all the formulæ of judicial niceties, would be insurmountable; and if they could be overcome, the circumstance of an oath, in this age of depravity, would be no obstacle to their authentication. The danger then of fraud, is not one atom diminished by the precaution intended. The keystone of this reasoning is laid upon the idea of fraud; a supposition that the law never allows to be made. So little is it countenanced by any authority, that it is laid down in 2 Bac. Abr. New Ed. 600, a seal is better evidence than an oath. The rule however with respect to other foreign judgments, has been relied on, and a train of authorities, which it is not meant to dispute, have been cited, to show not only the seal of the court where pronounced, but the hand of the judge who presided, must be substantiated. One word will suffice for all these. They were, excepting the case from *Espinasse*, which was a notarial copy of a ship-carpenter's survey, cases of judgments in municipal and local tribunals, proceeding according to a particular code of partial and confined jurisdiction. The courts of law are therefore not supposed to be connusant of the seals of fora, acting under a system which they do not acknowledge. This is not the case here. Courts of admiralty are held in all countries under one and the same law, the law of nations, equally in force in all. The reason on which a judge of the supreme court is supposed to know the seal of a court of common pleas, is, that each is a court of the same jurisprudence; acting under the same system, on the same principles, and its jurisdiction running in the same country. Wherever the jurisdiction is acknowledged, the seal of the court is supposed to be known. If then it can be shown, that what takes place in a foreign court of admiralty, is recognized and

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available of here, by process under the seal of such court, it follows that such seal must substantiate itself. In 1 Rol. Abr. 530. pl. 12, this is said to be the law. "If a Frizlander sue an Englishman in Frizland before the governor there, and recover against him a certain sum of money, which the Englishman, not having enough to satisfy, comes into England, upon which the governor sends his letters missive" (*which are always under seal*) "into England, asking all the magistrates within the kingdom to cause execution of the said judgment; the judge of the admiralty may execute that judgment by imprisonment of the party, and he shall not be liberated by the common law. For it is according to the law of nations that the justice of one nation shall be aiding to the justice of the other, and the one execute the judgment of the other: and the law of England takes notice of this law, and the judge of the admiralty is the proper magistrate for that purpose, for he only has execution of the civil law within this realm. Wier's case resolved upon a habeas corpus, and he remanded." It is evident that in this case, the authority of the imprisonment, which was founded on the letters missive, must have been before the court. No mention is made of the manner in which they were substantiated. So in *Jurado v. Gregory*, 1 Sid. 418*. "Where sentence is obtained in a foreign admiralty, one may libel for execution thereof here, because all the courts of admiralty in Europe are governed by the civil law, and are to be assistant one to the other, though the matter were not originally determinable in our court of admiralty." This case shows how fully admiralty jurisdiction extends over all civilized countries. It marks too the distinction between judgments in those courts, and judgments in foreign municipal tribunals. In the admiralty a libel may be filed for execution here, of a judgment abroad, in the same manner as an action may be maintained on a judgment in the supreme court, to obtain the benefits of it without examining into the merits on which it was rendered. As then the jurisdiction of the law of nations is acknowledged here, the courts of admiralty act under that jurisdiction. The seals of these courts must be supposed to be known here, like the seals of all other courts proceeding under the same authority. But it is not merely the seals of courts under the law of nations that are received as evidence; the seals of the officers of that law are equally

* S. C. 1 Vent.
32.

good testimony. The seal of a foreign notary public is evidence. Wherever the jurisdiction of a court runs, its seal requires no evidence to prove it. Judgments in the courts of the United States, are therefore evidence when under the seal of the court where pronounced, without proving the seal or signature of the judge. In *Jenkins v. Silas Pepoon*, debt was brought on a judgment rendered by the district court of the United States, for the district of Massachusetts. On a plea of nul tiel record, the plaintiff's counsel offered an exemplification of the judgment under the seal of that court. It was objected on the part of the defendant, that the act of congress respected only judgments of state courts. That it did not provide for the admission of judgments in the courts of the United States; that therefore proof should be made of the seal, or of the matters exemplified. The court however admitted the record unanimously, on the principle that it was a court of general jurisdiction, its seal therefore to be noticed by all courts, as carrying in itself evidence of its own genuineness. Against the reasonings on behalf of the plaintiff, the argument from inconvenience alone would be irresistible. Suppose a capture, and the vessel condemned in Bombay, after the proceedings have been transmitted here, must they be sent back under a commission to be identified? The delays, risks of miscarriage, and expense, would be intolerable. Another reason may be assigned why in the present case the seal need not have been proved. It was a collateral fact, immaterial to the point in litigation. The record of the sentence (if it may be so termed) was not in issue. Therefore a seal to it was not requisite to make it testimony. "There is a difference between pleading a record, and giving it in evidence. If pleaded, and the issue nul tiel record, it must be sub pede sigilli, or the judges cannot judge thereof; but, where it is given in evidence on a collateral fact, if it be not under seal, the jury may find the same, if they have *other good matter of inducement* to prove it." *White v. Pynder, Styles*, 22. The same authority may be used against the second point, that a register of a vessel, is, by act of congress, a record, and does not admit of parol proof; for the register was not in issue. It was not the matter in contest. The interest was the only subject of litigation. The exception cannot mean that a register is a judicial record, because it must then be an absolute verity *.

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* Dickson v.
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† Register
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never to be contradicted; not even admitting of proof that it once was wrong *. If a ship's register be not a record in the strict technical sense of the word, it is not proof of the facts it contains. It can amount to nothing more than *primâ facie* evidence. That which we adduced was equally *primâ facie* testimony. Between two equals there can be no difference. Then why prefer the register? The same weight of evidence is in one case as the other. To establish that the register of a vessel cannot be a legal record, and therefore that proof aliunde of it, and its contents, may be resorted to, the very act itself, under and by which it was created, is an authority. Navigating contrary† to the ownership expressed in the register, is by the provisions of the statute, a forfeiture of the vessel. On an information for such a breach of the revenue law, the facts contained in the register are the very subject of dispute. An instrument then, the facts in which are controverted by other facts, and go to a jury trial, can never be a legal record. When the question is as to the qualification of the vessel, as to what privileges and immunities she may demand, then the register may be the only evidence allowable: but to determine to whom the vessel belongs, it is only, *e pluribus unum*. The effect of a register may be illustrated by the following case. Suppose an act passed, authorizing commissioners to grant to persons swearing themselves entitled to lands, certificates, on production of which they should have a right to vote at elections. This certificate would be conclusive evidence of their right of suffrage, but would never establish their title to the lands. A doubt may be entertained how far the register is evidence at all. It is obtained on the oath of the party himself. It is contrary to legal principles to allow a party to testify in his own cause; this however is done in the fullest degree, without even the chance of cross examination, if the register granted on his oath, is evidence of the facts he has sworn to. But allowing the register to be evidence, as the original is at the custom-house where granted, a copy only could have been produced. This copy would not have proved any thing of itself; it must have been corroborated by the affidavit of some one who had compared it with the original, and would have taken all its effect from the oath. In the present case, the same sanction is afforded, for the witness swears to seeing the original in the name of the plaintiff below. The very fact,

then, which the copy would have established, has been substantiated by oath. But where a deed is lost, a simple copy without witnesses, and unsupported by affidavit, will be allowed in evidence *. 1 Lev. 25. A fortiori in such a case it may be proved by witnesses, that there was an original which they saw. Under our register act, however, it is to be observed, that the register is not a proof of property. The register may be in the name of one man, and the legal right of ownership in another. With us, the only consequence of a false recital of the owner's name, as it regards the property, is, that the vessel is not entitled to the privileges † of an American vessel. But under the British statute, a false recital renders the transfer null and void ‡, so that no property passes. Rolleston v. Hibbert, 3 D. & E. 407. Camden v. Anderson, 5 D. & E. 709. Westerdale v. Dale, 7 D. & E. 306. Moss v. Charnock, 2 East. 349. It was on the principle stated in the distinction taken, that the decisions in the cases cited entirely rested; no one of which was on a policy of insurance. In actions on these it is not necessary to prove a strict legal title. An equitable, nay, a possible interest is sufficient §. This appeared from the sentence acquitting the vessel as neutral, and from the proof of the citizenship of the now defendant. It is not said the proof was conclusive. It was *primâ facie*, enough to go to a jury, and if not rebutted, then it became conclusive. The object of the act was not to confer on registers the character of legal records; it was to use them as mere memoranda, for the purpose of informing the custom-houses what tonnage-duty ought to be paid. This is further evinced by the act specifying what vessels shall sail under records, and what under registers. Under the former, are to navigate all those built in the United States, but owned wholly or partly by foreigners; under the latter, all so built owned entirely by American citizens. The first pay 30 cents per ton, the other six. The word Record, when used therefore in our laws, signifies no more than an office memorandum. It is exactly synonymous. In our state law respecting mortgages, it is said to be unnecessary "to record *or* register at full length the certificate." 1 Rev. Laws, 480, sec. 4. So in the register act itself, sec. 9, the collector is ordered to "make and keep in some proper book a record *or* registry thereof." The same in sec. 26, 7. So in the act to regulate the collection of duties

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* The copy, in this case, was of an old deed, and was found among the muniments of the estate. It was observed also in the case, that many of the old deeds were without witnesses.

† Register Act, Sect. 14.
‡ 26 G. 3. c. 60. S. 17.

§ *Lucena v. Craufurd*, 3 Bos. & Pul. 75.

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on imports and tonnage, sec. 21, collectors, naval officers, and surveyors, are directed to keep "true accounts *and* records" of all their transactions. 4 Laws Unit. Sta. 315. Being coupled with the word accounts, shows the meaning of the term, *noscitur a socio*. If the appellation of a record is, whenever applied to any writing in a statute, to give it the force and efficacy of a legal record, what a host of judicial records of absolute verity shall we have! Every permit, every custom-house paper, would be a record. For records must be so either in the legal, or the vernacular acceptation of the word. There is no third or hermaphroditical sort, partaking of the natures of both. Whenever a record is ordered by an act to be made of any transaction, if it is to have any peculiar weight as evidence, that weight is always declared. Thus, in our state law, relating to the proof of wills in the court of common pleas: "and the record of the said will so proved and recorded, shall be as good and effectual in all cases, as the original wills would be if produced and proved." 1 Rev. Laws, 179, sect. 6. So *ibid.* 317, sec. 7, relative to the records by surrogates: "Which records shall be of the same force as the like records in the office of the judge of the court of probates of this state." So the certificates given to paupers by their towns, when filed and *recorded* by the town clerk where they come to reside: "Every such certificate, so acknowledged or proved, and allowed as aforesaid, shall be deemed in all courts whatsoever within this state as duly proved, and shall be taken as evidence without any other proof thereof." 1 Rev. Laws, 570, sec. 12. The laws of the union are in exact coincidence on this point with our own. By the act imposing a direct tax, 4 Laws Unit. Sta. 174, sec. 6, the absence of commissioners from meetings is to be recorded and noted in a book, together with their excuses for not attending, the transcripts from the records of which are "declared to be conclusive and legal evidence." By the 25th sec. of the same statute, page 187, the alienations of lands assessed, are to be recorded. Does this shut out all proof of title, by any thing less than matter of record? The truth is, that acts prescribing registers and records, do not abrogate proof by any other mode. Therefore, though the 26th G. 2. c. 33, sec. 13, ordains that a registry shall be kept of marriages, it does not exclude the presumptive evidence arising from cohabitation. 4 Bac. Abr. new Edit. 537. In

the next place, when transactions in foreign states are to be established, there is some relaxation in the rule as to adducing the best evidence the circumstances could afford. In *Wallis v. Delancey*, cited in *Barnes v. Trampowsky*, 7 D. & E. 266, on a bond, the hand-writing of *one* witness only was proved. With regard to the other, there was no evidence that he was either dead or abroad. The defendant contended it was not the best evidence the case would furnish. Lord Kenyon. "This is a foreign transaction. The proof *might be more perfect*, yet it was sufficient and reasonable evidence for a jury, at least, unless *rebutted* by some evidence on the other side. "The expense in sending a commission would, in many instances, be more than the value of the sum in dispute." There is not a word in this decision which does not apply to the present case. On the score of inconvenience argued against the first exception, it is conclusive. On the point of presumptive and *primâ facie* evidence, it is parallel; for the individual states, with respect to each other are foreign countries, under distinct and independent sovereignties. The exceptions appear to urge as erroneous the admission of parts of the proceedings in the admiralty under the seal of that court. It has not been insisted on in argument, but it may not be improper to observe, that so much only of a record as concerns the matter in question, need be given in evidence. To prove the filing of a declaration, it surely is not necessary to show the writ. The whole end of the exceptions before the court, is to gain a new trial. On this subject, if the same considerations can be here entertained, it is laid down, that they are not granted on nice and formal objections, which do not go to the real merits. 3 Black. Com. c. 24. So if the verdict of the jury be agreeable to equity and justice, the court will not grant a new trial, though there may have been an error in the admission of evidence, or in the direction of the judge. *Wilkinson v. Payne*, 4 D. & E. 468. The conduct of the plaintiff in error determines the justice of the case. He does not deny, nay, by the course he has taken, he confesses the facts offered in testimony. He does not rebut, or offer to do away the presumption arising from them, and therefore we may say, *stabit presumptio donec probetur in contrarium*.

Pendleton in reply. The rule of law is, that all evidence ought to be at the trial. What the weight of that evidence

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might be, cannot be now taken into consideration. The only point is, was it properly received? Therefore, however the facts are admitted, no advantage can arise in this court upon these admissions. Nothing has been said to show the proof of the seal of the vice-admiralty court ought to have been dispensed with. That courts here may be applied to for execution of an admiralty sentence, is not law, and would be ridiculous in any country. The whole train of argument, as to evidence of the register, goes upon the idea of its having been lost; but as the vessel was restored, the presumption is, her papers were with her, and in the power of the plaintiff, who ought therefore to have produced the one granted by the custom-house at Charleston, or have shown why that could not be had. On any ground, therefore, we presume a new trial must be granted.

Per curiam delivered by Lansing, Chancellor. The plaintiff in error relies upon two points, for the reversal of the judgment rendered in the supreme court in the first of these causes. His counsel have stated them, and insisted—1st, That the brig John, having been released fourteen days before the abandonment, *the mere ignorance of the owners of that circumstance*, could not give them the right of abandoning the brig to the insurers, which it was admitted they could not have done, if they had known the real truth on the subject. And, 2dly, That the money received by the owners for the brig, ought to have been deducted from the same, as the underwriters were liable to pay, and the assured entitled to recover, only for the difference between that sum and the sum insured. These questions, it appears, arose at the trial of the cause at the sittings, and the Judge who presided, decided the suit on the authority of the case of Mumford v. Church, which was very fully and ably argued, while I was in the Supreme Court, in July Term, 1799; and, after much deliberation, the whole court united in opinion, that the abandonment was conclusive. My notebook is not now within my reach. I cannot therefore resort to it to refresh my memory, but I have a copy of the case which was stated by the parties in that cause, and from that it appears, that the policy was on the brig Betsey, which sailed from New-York for Petit-Guave, in the island of Hispaniola, on the 12th May, 1798; that she was captured by a British cruiser on the 26th day of the same month of May, and sent into Port Mole St. Nicholas, where she was detained three

weeks, and then restored upon paying charges; and that, after a further detention of three weeks, she was permitted to depart, but under a British convoy to Jamaica, from whence she returned to New-York. The abandonment was made the 12th June: The restoration had not taken place when the abandonment was made; for the capture was on the 26th May, the abandonment on the 12th June, and three weeks from the former of those days, during which the litigation with the captors was pending, clearly over-reached the period of the abandonment. The notes which Mr. Justice Kent took on the subject, and which I have examined since the argument of these causes, show, that this was particularly adverted to by the court. If, therefore, the opinion given on that occasion was expressed with the latitude intimated, it was so far as it was beyond what the circumstances of the case required, extra-judicial; and, as such, it would not now be considered as authority in the court, which pronounced it. The general reasoning resorted to in the decision of cases, is sometimes calculated to mislead; but whenever it becomes necessary to examine them as authority, it must be rigidly restrained to the existing case. That the decision in this cause was supposed to be broader than it appears upon examination to have been; and that it was so received, is evident from the case of *Slocum v. Burling*, determined in October term, 1799. In this a question arose on a policy insuring a cargo which was captured, liberated, and afterwards abandoned, before notice of the liberation had been received. That case was decided without argument, expressly on the authority of that of *Mumford v. Church*; and on the general ground, that an abandonment once made was definitive. So were the present cases at the sittings. I however think that these cases are in no respects similar to that of *Mumford v. Church*; and that, even in the supreme court, they would still be considered as embracing an open question. In most occasions of maritime insurances, the remoteness of the owners from the subject insured, effectually precludes from a direct personal agency in its management, on the spot to which it may be conveyed, by any of the incalculable variety of incidents to which this species of adventure is so pre-eminently exposed. To obviate some of the inconveniences arising from this circumstance, they are sometimes permitted to act, upon the best

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information they are able to acquire of the actual situation of the subject insured, and to make such information the basis of the rights they intend to assert, in consequence of the occurrence of any of those accidents, which, in their effect, produce either a *technical or actual total loss*. But certainly, if the information is either totally unfounded, or materially variant from the truth, it would be a strange position to maintain, that its resemblance should be preferred to the truth itself. If the insurers and insured had been at the port to which the captors carried the brig, an abandonment, under all the circumstances of this case, could not have been permitted; for at the time it was made the vessel was restored, and prosecuting its destined voyage. From the mere act of abandonment, no positive right can be derived to the insured, unless it be combined with a total loss; for if the loss should, in the final event, prove an average, instead of a total loss, the act of abandonment would be nugatory. In these cases, the loss is not pretended to be deduced from the deterioration of the vessels; the first policy was underwritten for \$5000, the repairs of the vessel amounted to about \$800, and the full freight from New-York to Cadiz, was paid by the captors; the amount of this loss, calculated from the comparative value of the subject insured, with the amount of the repairs, clearly, *on that ground only*, would constitute an average loss. That this is the doctrine adopted in Great-Britain, and which still obtains there, appears from some of the cases cited. In the case of *Goss v. Withers*, it was made a point, whether the assured had or had not a *right to abandon*, after the ship had been recaptured and carried into Milford harbour. The capture was assumed, as *prima facie* constituting a total loss. The salvage amounted to half her value; the loss of freight, the captivity of the master and mariners, the dissolution of the charter party, and the disability of the vessel to pursue her voyage, are reasons given by the court, from which the continuance of the total loss was to be inferred, and on that ground *only*, and not because the capture constituted a total loss, was the judgment of the court given. In the case of *Hamilton v. Mendes*, which arose on a policy on the ship *Selby* and her cargo, from Virginia or Maryland, to London; the ship had been captured, recaptured, and carried into Plymouth, where

2 Burr. 683.

2 Burr. 1198.

she arrived on the 6th day of June, 1760, and was offered to be abandoned, at London, on the 23d of the same month.

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The ship had sustained no damage from the capture, and the whole cargo was delivered to the freighters, at the port of London, who paid the freight. Lord Mansfield, in deliver-

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ing the opinion of the court, observed, that the ship and cargo, in the case of *Goss v. Withers*, were literally lost. He explains the words quoted from his opinion in the latter case :

“ that there is no book, ancient or modern, which does not say, that in case of the ship being taken, the insured may

“ demand for a total loss, and abandon,” and adds, “ but the proposition was applied to the subject matter, and is certain-

“ ly true, provided the capture or the total loss occasioned thereby, *continue to the time of abandoning and bringing the*

“ *action.*” He afterwards lays it down, as the point intended to be determined, *that the plaintiff upon a policy, can only re-*

cover an indemnity, according to the nature of his case, at the time of the action brought, or at most, at the time of the offer to abandon, and observes, that the plaintiff's demand is

for an indemnity. His action, then, must be founded on the nature of his damnification, as it really was, at the time of the action brought. It is repugnant, upon a contract of in-

demnity, to recover as for a total loss, when the final event has determined that the damnification is in truth, *an average*

loss only. This reasoning is adopted, after an elaborate research, after solemn argument, and deliberate examination of the theories of foreign jurists, and after a critical review of the opinion given in the case of *Goss v. Withers.* From

these circumstances, as well as from the great talents and ability that so eminently distinguished the tribunal which decided those cases, they merit particular attention, and are well

entitled to be considered as very weighty authority. They would have been respected as such anterior to the revolution, and, in the estimation of our courts, that authority has not

been weakened by the change of government. The doctrines deducible from these cases, go the length of determining these; for they fully establish the position, that a capture

may, according to circumstances, either produce a total or partial loss; as, therefore, the actual loss in the first instance, is less than one-sixth of the valuation of the brig in the policy,

the abandonment could be founded only on a *partial loss*,

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1 D. & E. 187.
Cazalet v.
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which of consequence, was incapable of constituting a case to warrant it. The case of *Mills v. Fletcher*, was decided since the revolution, on the point, that if the owner suffers so much from a capture, that it is not worth his while to pursue the voyage, he may abandon; and the reasoning in the case of *Goss v. Withers*, and *Hamilton v. Mendes*, is again recognized and enforced. I have therefore no doubt, but that these cases ought to be governed by those of *Goss v. Withers*, and *Hamilton v. Mendes*, as well on the ground of authority as the cogency of the reasons given for those decisions. As before the abandonments, the event of discharge of the vessels had constituted an *average loss only*, the defendants are not entitled to recover as for a total loss. In forming this opinion, I have not brought into view those of the foreign jurists, cited in argument. In many instances, it is useful to resort to them, to elucidate general principles; but the occasional infusion of the spirit of local codes into their general system, renders it sometimes difficult to discriminate accurately the degree of weight which ought to be attached to these opinions, on the principles they treat of. In these cases, I do not think it necessary to enter into an examination of their doctrines, as the court can repose themselves on judicial opinions, derived to us as authority. But if it were necessary, from the slight glance which has been offered, I am persuaded they are capable of being reconciled, and that they would tend to corroborate the general result drawn from the cases adjudged in the English courts. As to the second point, in the case first argued, thinking as I do, that the first concludes against the defendant in error, if my opinion would prevail, it would not be necessary to decide on this; I shall however very briefly state my opinion on the second point also. If this was the case of a total loss, the defendants in error, by abandoning, completely divested themselves of their interest, and as they afterwards sold the vessel, if the abandonment was valid, they of course disposed of property which the act of abandonment unequivocally determined, was that of the plaintiff. This is not the case of mutual dealing, but the sum received is the price of the subject, for the damnification of which a compensation is demanded. It is a charge inseparably connected with that subject, calculated to diminish the amount of the compensation, and the forms of law must be exceedingly rigid and

unbending, to preclude the plaintiff, (the defendant in the court below) from entitling himself to a deduction of the amount of the sale. I therefore think this, without notice of a set-off, a proper ground for deducting the amount of the sale, after adjusting all reasonable allowances from the sum demanded by the defendants in error, and that the evidence to that point, ought to have been admitted. I am therefore of opinion, on both points, that the judgments in these causes should be reversed.

The whole court being unanimous in this opinion, the judgments in both causes were reversed, on the point of abandonment.

**Richard S. Hallett and Walter Bowne, against
Ebenezer Jenks and others.**

IN error, on the judgment of the Supreme Court in Ebenezer Jenks and others, against Richard S. Hallett and Walter Bowne, reported in 1 Caine's New-York Reports, 60. The case was exactly as it is stated there, and the arguments of counsel only a repetition of the points before insisted on in the court below.

Lansing, Chancellor. On this case three questions have arisen: 1. Whether the sloop Nancy violated her neutrality by receiving the paper described in the case as a pass-port, found on board at the time of her capture? 2. Whether the voyage was illegal, and in contravention of the laws of the United States? 3. Whether the concealment of material circumstances would avoid the policy? As to the first point, the reasons given for the judgment of the supreme court appear to me satisfactory. There is nothing beyond the mere import of the paper which can aid in giving a construction to it. In its form it professes to contain simply a request to the officers of the French navy and privateers, to let the vessel *pass free*; and whether it is in the ordinary, or an uncommon form, does not appear. If it was the ordinary clearance used in the island of Hispaniola, it could not be considered as a violation of neutrality to carry it in the vessel; and as it is expressly found by the verdict that the passport was received on board at the Cape, no inference to the prejudice of the insured can be drawn from its being antedated, which

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A vessel driven by distress into a French port, where a part of her cargo is taken by the officers of the government, and she prevented from taking away her original lading, may, without incurring the penalties of the acts forbidding all intercourse with the dependencies of France, purchase and load with the produce of the country. A passport granted by any particular government, to protect against its own cruisers, is not a sailing under the protection of the flag of that government, so as to stamp a national character on the vessel.

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might be the effect of positive regulation; and, as it has not been found by the verdict, that it was intended to confer some uncommon privilege on the vessel, I think, under all circumstances, it must be considered as a mere clearance. As to the second question, the voyage, in its commencement, was a lawful one. It was from one of the ports of the United States to the Havanna, a Spanish port; and the verdict finds that the vessel was compelled, *by distress*, to put into Cape François, in the island of Hispaniola. To the time of her arrival at the latter port, nothing had been done to forfeit her neutrality; the touching at it was the effect of inevitable necessity; the unlading the cargo was in compliance with a similar necessity, *for the vessel required to be repaired*. The disposition of the cargo was not a voluntary act; and its conversion into the productions of that island, was so far an act of necessity as to leave only the alternative of abandoning the interest, or giving it the modification dictated by the government. The policy was made to insure the cargo, thus acquired at Hispaniola, against *all risks*. The intent of the law of the United States, seems to have been, to restrain their citizens from aiding in the French carrying trade, and by that means to impress the necessity of respecting our neutral rights. All the restraints imposed by the statute are upon the vessel. The vessel is inhibited from being employed in the *traffic or commerce* described in it. The finding of the jury has completely severed the vessel and its cargo; for it is found by the verdict, that, upon the arrival of the vessel at the Cape, the cargo *was landed, and was not permitted to be re-laden*. The unlading was the effect of necessity, and though the captain disposed of the cargo, neither its disposition nor the new investment could be considered as the employment of the vessel; and yet the *employment of the vessel* was the only point to which the forfeiture could attach. The landing was involuntary, the re-lading impracticable; and though the vessel was afterwards resorted to as the vehicle of conveyance, it was to carry the property of citizens of the United States, acquired under circumstances of coercion, and it may literally and truly be said, in the language of the statute, not to have been employed in any traffic or commerce *with or for any person* resident within the French territory. The statute was limited in its operation to vessels departing from the United States

after the 1st day of July, 1798. After directing that such vessels should not be permitted to proceed to any port or place of the French republic, and *should not be employed in any traffic or commerce with or for any person* resident within or under the jurisdiction of the French republic, it adds, "and if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried, or suffered to proceed to any French port or place aforesaid, *or shall be employed* as aforesaid, contrary to the intent of the said act, that then the vessel and cargo shall be forfeited." The law was not intended to embarrass the citizens of the United States fairly pursuing the active speculations of trade. It never could have been the intent to devote to indiscriminate destruction, as well the property of those whose misfortunes subjected them to an irresistible necessity or force, as those who had voluntarily evaded its provisions; and though a variety of cases may occur in which private rights must unresistingly bend to the safety and preservation of the commonwealth, they are to be found only in the extent, as applied to great and imminent emergencies; and even in the case of treason, the authorities cited to establish the doctrine, show, that there may be exceptions to the universality of the rule. Here every fact, calculated to show that the conduct of the master was the effect of an influence he could not resist, is established by the verdict. This brings it within the purview of the first section of the statute, and appears to be contradistinguished from *voluntary* acts; for the word *voluntary* may well be considered as the adjunct to the whole sentence, and not necessarily, in sound construction, to be exclusively limited to the words *carried or suffered* to proceed to any French port or place as aforesaid; and I think numerous cases must occur, in which a vessel may, with as much propriety, be said to have been *involutarily* employed in trade, as to have been involuntarily carried into port. The law of Congress, of 9th February, 1799, is sufficiently broad to embrace this case: it provides that if it shall appear, that any ship or vessel, *seized* for the contravention of that or the former statute, was captured or driven *by distress of weather*, or was *unavoidably detained or delayed*, by some embargo, &c. or *other unavoidable casualty*, without any *fault, wilful negligence, or intention to evade* the provisions of the said statutes,

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4 Laws U. S.
129, sect. 1.4 Laws U. S.
248, sect. 6.

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the secretary of the treasury may direct a restoration of the vessel and cargo. If it could be brought within the provision of the last statute, the decision of the secretary might, even after a seizure, have constituted this a legal voyage. The case of *Richardson* seems to have some analogy to this; but we are totally unacquainted with the reasons which influenced the court in that case, and I think too imperfectly acquainted with its merits, to consider it as having any weight here. The concealment of material circumstances is the last point. The cargo of the vessel was insured on a voyage from Hispaniola to St. Thomas. As the insurance was made after the passing of the second act, and from it, circumstances might exist to constitute the voyage from Hispaniola a legal one; with a full knowledge of this circumstance, the insurers underwrite against *all risks*. But it has been said, that the time of the departure of the *Nancy* from the United States does not appear to have been disclosed to the insurers; and hence it is inferred, that there was a concealment of a material circumstance. The allegation of *concealment* is in the nature of an *avoidance*, and must either be pleaded or averred, and in all events must be proved, or it cannot, in legal operation, avoid a contract, in other respects valid. It is alleging the existence of a fraud, and is of itself a substantive and effective defence, capable of destroying the contract. Nothing of this kind appears in the record; and in pronouncing an opinion in this case, the court are necessarily confined to the record. For these reasons, I am of opinion the judgment in this case ought to be affirmed.

L'Hommedieu, senator. Two months had elapsed after the vessel's sailing, before the insurance was made. It was then effected at a premium of 25 per cent. This is evidence of extraordinary risk; and it is more probable that the insurers knew of her situation, than that the insured made any concealment. We cannot suppose the insurers would have asked so high a premium, if they had not known her situation, in what port she lay, and the possibility of her sailing with such papers. But these cannot be said to enhance the price of insurance, as they would be rather in favour of her safety than against it. The captain did not go to a French port *voluntarily*. After he was there, and could not bring away his property, it was more to the interest of the United States, that he should bring some equivalent, than to leave

the whole, never to be recovered. On this ground, among the others already stated by the court, the conduct of the assured ought not to be considered against the intent and meaning of the laws of the United States. I shall only observe, that it is probable, that the vessel could not have escaped, or come from a French port, without the clearance or certificate found in her, but at the risk, perhaps certainty, of being taken by the French cruisers, who knew her situation. On the whole, I am of opinion, that the judgment of the supreme court ought to be affirmed.

* * The whole court concurring, the judgment of the supreme court was unanimously affirmed.

Thomas Waters, Richard Thorne, and Sarah his Wife, Appellants, against John Stewart, Respondent.

THIS was an appeal from a decree of his Honour the chancellor. The complainants filed their bill, as well in behalf of themselves as others the heirs and devisees of Sarah Wisner, deceased, who might come in and contribute, &c. &c. The bill set forth an indenture of three parts, dated the 8th April, 1769, between Henry Wisner, since deceased, of the one part, Sarah Waters, since deceased, of the second part, and the complainant, Richard Thorne, of the third part; which indenture was admitted by the defendant; and among other things, as far as it is material, substantially contained as follows:—That in consideration of a marriage about to take place between the said Henry Wisner and Sarah Waters, she had conveyed to him all her estate, real and personal, authorizing him to sell and dispose of the same; the monies thence arising to be enjoyed by the said Henry Wisner, during the joint lives of him and the said Sarah, he maintaining and educating three children of her's by a former husband, namely, Elizabeth, Hannah, and Thomas Waters, till they should come of age or marry, if the said Henry should so long live. But in case the said Sarah should survive the said Henry, the money arising from her estate as aforesaid, should be paid to her; and in case he survived her, it was to be paid to her children before named; and that in such case she should have and enjoy during her widowhood, a dwelling-house and

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farm of his, situate in Goshen, containing about seventy acres, *which were the premises in question.* It was admitted that the marriage between Henry Wisner and Sarah

Waters took place; that he took and disposed of the property she conveyed to him, to the amount of £425. That

Henry Wisner died in the life time of Sarah, insolvent, but did not secure to her the money arising from her estate as

he covenanted to do; consequently, that a considerable sum was due to her after his death, and to her representatives after her death, from Wisner's estate, which can never be obtained, *unless the premises in question are made liable.* That

Sarah, the widow of the said Henry Wisner, enjoyed the said house and farm in Goshen, during her widowhood, under and by virtue of the said marriage contract, and until her death, which happened in or about the month of July, 1801.

It was also admitted, that Henry Wisner, deceased, in his life time, to wit, on the 14th day of February, 1786, mortgaged the said house and farm to William Beekman, to secure payment, on or before the 14th day of February, 1787, of £387.

13s. with lawful interest, bona fide due. That William Beekman on the 13th of October, 1792, for the consideration of £300, (200 whereof was then paid, and a bond given for the remaining £100, payable on the death of the said Sarah Wisner) sold and assigned the said mortgage and a bond

which accompanied the same to the respondent, John Stewart, with all the money due and to grow due thereon. That

a judgment at law was obtained against the said Henry Wisner, deceased, and thereupon a *feri facias* and *venditioni exponas* were issued to the sheriff of the county of Orange, who

by virtue thereof, in the life time of the said Sarah, the widow of the said Henry Wisner, among other things, sold the equity of redemption of the said mortgaged premises, subject to the said widow's estate therein, to Henry Wisner, junior.

That Henry Wisner, junior, on the 19th day of April, 1791, conveyed among other things, the right and interest he had purchased in the said premises, to Polydore B. Wisner, as a trustee, to enable him to sell and convey the same; and Polydore B. Wisner, on the 11th of January, 1793, conveyed

the said equity of redemption in the said mortgaged premises to the defendant, John Stewart, in satisfaction of a book debt he had against Henry Wisner, the elder, then deceased.

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Thus the defendant, as assignee of the mortgage and the purchaser of the equity of redemption, under a sale on an execution at law, claimed to be the legal and absolute owner of the house and farm in question. It was admitted that Henry Wisner, deceased, by will duly executed, devised the said house and farm to his two daughters Elizabeth and Sarah, in fee. That, since the death of the said Henry Wisner, and before the bill was filed, the said Elizabeth and Sarah, in due form of law, conveyed all their right and interest as such devisees in the said house and farm, to the complainant Thomas Waters, in fee. The bill was to redeem the house and farm, by paying to the respondent, Stewart, what he was entitled to receive as the assignee of the mortgage; that is to say, the sum he paid with interest; or, if he should be entitled to it, the whole amount of the mortgage-money and interest. This right of redemption was contended for before the Chancellor on two grounds; *First*, That the complainant, Waters, and the other children and heirs of Sarah, the wife of Henry Wisner, were creditors under the marriage contract; and that, in equity, that contract bound the premises in question to pay those demands, after paying the mortgage given to Beekman. *Secondly*, That an equity of redemption could not be seized and sold by virtue of an execution at law, and that consequently, Thomas Waters, having purchased and taken a conveyance from the devisees of the estate, had a right to redeem the mortgaged premises upon equitable principles, by paying the assignee of the mortgage what he was entitled to.

The Chancellor being of opinion against the complainants on both grounds, decreed that the bill should be dismissed with costs, and thus assigned the reasons on which he had pronounced.

Mr. President—This cause came before the court on a motion for the dissolution of an injunction, issued to restrain the defendant from obtaining possession at law of the premises in question. On that motion the whole ground of controversy was explored, and the counsel for the parties, discovering that a determination on it would involve a decision on the merits generally, argued it a second time, *as on a final hearing*. In doing this, they united in presenting, as a determining point between the parties, simply, whether an equity of redemption in lands mortgaged in fee, is subject to a sale

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as a *fieri facias*? To determine this question, the nature of the subject, and the course of the arguments of the counsel, lead me cursorily to trace the progress of the English jurisprudence (as far as it has any bearing on this point) from its departure from the common law, until the act of the 5th Geo. 2d, and the subsequent modifications it has received here. It is certainly a sound moral principle, that every description of property held by a debtor, should be subject to the payment of his debts. The policy deduced from the feudal system, was, however, far from being in strict unison with this principle; and had so far blended itself with the English institutions, as generally to resist the infusion of those dictated by more just and liberal views. This detracted from the security and preservation of lands in the hands of those who held them, and their heirs; for, at common law, only goods and chattels, and the growing profits of land were, on a *levari facias*, or a *fieri facias*, liable for the satisfaction of debts. This strictness was somewhat retained by the statutes of *elegit*; for it appears to have been a reluctant departure from the more ancient doctrine—certainly not reconcileable to its general scope and object, and equally remote from the principle the framers of the statute appear to have been disposed to approach: for, instead of carrying the remedy the length which complete and effectual justice required, it subjected only half of the debtor's real estate to an extent, with a reversionary interest to him or his heirs, after the debt was satisfied from the profits of the lands. The inroad made on the common law principles, by giving the *elegit*, has, however, been protected by several successive statutes: thus Blackstone, in his Commentaries, enumerates, among the evils arising from the doctrines of uses, *the defrauding the creditor of his extent for debts*. He adds, to remedy these inconveniences, abundance of statutes were provided, which, among other things, made the land liable to be extended by the creditors of *cestui que use*. Among these, the statutes of uses, and of frauds and perjuries, were most effective; and, after the passing of the latter statute, a *trust estate*, whether declared or resulting, was considered, in the language of Blackstone, “as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge *in equity*, which the other is subject to *in law*.” “The trust may descend; be alienated; is liable to debts;

3 Co. 11. Har-
bert's case. 2
Inst. 394.

2 Bl. 332, cites
use of the law,
153.
5 Ed. 3 Ch. 6.
2 Rich. 2 C. 23.
19 Hen. 7 C. 15.
27 Hen. 8 C. 10.
29 Ca. 2 C. 3.

2 Bl. 337.

“ to executions on judgments, statutes, and recognizances
 “ (by the express provision of the statute of frauds) to for-
 “ feitures, to leases, and other incumbrances, nay, even to
 “ the curtesy of the husband, *as if it was an estate at law.*”

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Thus, in the case of *Casborne v. Scarfe and Inglis*, lord Hardwicke lays it down, that an equity of redemption cannot be considered as a mere right: but such an estate whereof there may be a seisin, and that the person entitled to it is considered as the *owner of the land*; that an actual possession, clothed with the receipt of rents and profits, is the highest instance of an equitable seisin; and that the mortgagee, as to the legal estate and inheritance, is merely a *trustee* for the mortgagor, until the equity of redemption is released or foreclosed. In the case of *Amhurst v. Dawling*, an advowson, appendant to a mortgaged manor, had, before that, been held in the nature of a *trust* for the benefit of the mortgagor: so, in the case of the *Attorney-General v. Hasketh et al*¹, in which the same doctrine had before been laid down; and it is in that case expressly declared by the lord Keeper, *that the court which supports trusts, will prevent trusts from doing mischief.* The spirit of these cases has been recognized and enforced in the British courts of *common law*. In the case of the *King v. the Inhabitants of St. Michaels*, decided after our revolution, lord Mansfield emphatically declares it to be “ an affront to common sense to say, that the mortgagor is not the real owner.” And whatever might have been the construction at an earlier day in those courts, in equity, the intent of the parties has been permitted to give a complexion to this kind of transaction, and to constitute it a naked security for the payment of money, without any of the substantial rights of ownership. It is merely a lien until it is foreclosed, or the possession acquired by the mortgagee: thus the mortgagor, until either of these events occur, is the beneficial owner; he takes the rents and profits without any account; he is a freeholder, qualified to vote as such, and he is deemed the owner of a landed estate within the English settlement laws. The provision for admitting him to vote, is, indeed, by statute;

1 Atk. 603, in
 1737.

2 Vern. 401,
 in 1700.

2 Vern. 549,
 in 1706.

Doug. 610. 25
 Geo. 3.

Doug. 455.
 Eaton v.
 Jaques*.

* This case went on a principle of there remaining in a lessee, after an assignment by way of mortgage of all his right, title, &c. in the term, and after forfeiture, such a degree of interest as to prevent the lessor from suing the mortgagee as assignee of all the estate, &c. of the mortgagor. But in

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but it appears to me merely a declaration of the law, previous to the passing of the act, and introduced for greater caution. The case of *Lyster v. Dolland*, reported in 2d Brown's Ch. Rep. 478, and 1 Vesey, J. 431, does not impugn the general doctrine; for in the report of that case in 1 Vesey, the lord chancellor admits, "*that an equity is extendable*, and the mortgagor is expressly let in to redeem, on the ground that the mortgagee had so mixed his own interest with that of the mortgagor, that they could not be distinguished." I take it, then, that an equity of redemption in England is an extendable interest, and that so is the property of *cestui que trust* in the hands of trustees. Bunb. 346. The solicitude of the holders of landed estates, to perpetuate them within families, combined with the genius of the English government, contributed to maintain the distinction between real and personal property, which obtained after the passing of the statute of *elegit*: but the collision between the landed and commercial interest being merely *local*, as confined to Great Britain, and not so extending to its colonies as to re-act by influencing its parliament, in which the landed interest of those colonies had neither a direct nor virtual representation, the same impediments did not present to the passing of the stat. of 5 Geo. 2 chap. 7, for the more easy recovery of debts in the colonies. This subjected real estate to a disposition, in like manner as personal, on execution, and a remedy was thereby given, co-extensive with the property of the debtor, regardless of the distinction which had been so sedulously preserved in Great-Britain. This statute so far extended in practice in this state, while a colony, as to affect lands by sales on executions, issued on judgments obtained against the executors of debtors, on the principle, that the statute of 5 Geo. 2, had, in its operation, *so far as respected the interest of creditors*, completely converted real into personal estate. It is certain, that sales of equities of redemption have been uninterruptedly made, from the time of passing that statute, until the legislature passed the statute of 19 March, 1787; and the same practice, as to such sales,

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Stone v. Ewer, Sitt. at West. before Kenyon, af. M. T. 39, G. 3, his lordship declared he could not subscribe to the doctrine laid down in *Eaton v. Jaques*; and in *Westerdale v. Dale*, 7 D. & E. 306, it seems evident that his lordship considers the mortgagee of a term for years, liable to the rent reserved.

has continued to prevail under the latter statute. This statute subjected every species of estate, comprehended in the very extensive description of "*lands, tenements, and real estate*," to be sold on execution, and is strictly compatible, in its most comprehensive construction, with the general provision, that both real and personal estate, in the hands of the heir or executor, (and whether the debt was contracted by specialty in which the heir was named, or otherwise), shall be applied to the satisfaction of the debts of the ancestor, or testator. There is one objection which was strongly urged against giving effect to those sales here, and that is, that the purchaser could not take the effect of it at law. If this position was correct, I do not think it is so forcible as the counsel who urged it. A sale on execution is *not enforced peculiarly by the court under whose process it is made*; the evidence of the sale is furnished by the sheriff, and the purchaser elects the forum, to which he intends to resort, to give him the benefit of it. If any of the fora of the state are competent to give him the effect of his purchase, every intent of the sale is fully accomplished; and I know no legal or equitable principle that can repel this result. But if the mortgagor was possessed, at the time of the sale, the controversy must strictly be between the mortgagor and purchaser: no inconvenience can arise from compelling the former to yield his possession to the latter. Thus, in a recent case, it has been held in the K. B. in the case of *Bristow v. Pegg*, 1 D. & E. 758, 25 Geo. 3 *, if there is an existing title paramount the person who holds, he may avail himself of it by showing it, and it does not lie in the mouth of the *mortgagor* to allege its existence; for, notwithstanding a title might exist, by virtue of which the person *actually seized* might be ousted, it would seem strange that *his right of seisin* should pass by the sale, and the latent equitable interest which he had in the lands, should be retained by him. From these considerations; from the number of estates which depend on supporting sales of this nature; from the long practice which has obtained respecting them; and from the great inconvenience which would result from the doctrine, that however great the disproportion between the sum secured, and the value of the estate charged with it, the latter might be protected from being applied to the satisfaction of judgment creditors on executions, I think sales of this

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1 Rev. L. 388,
sect. 1.* See *Hodsdon v. Staple*, 2 E. 684, which seems to have shaken *Bristow v. Pegg*, at least in the English courts.

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kind ought to be sustained ; and that, whether the mortgagor is considered *as the real owner*, or the mortgagee is considered *as his trustee*, an equity of redemption is within the purview of our statute, *and subject to sales on execution*. The complainants' bill must, therefore, be dismissed with costs.

Riggs for the appellants. We admit the moral justice and policy of making every man's property liable to his debts, and we shall even concede that with us, these principles have been carried further than in England ; but notwithstanding this, the distinctions between legal and equitable estates, have in each been preserved, their boundaries equally marked out, and the fora by which they are to be approached kept invariably distinct. In equity, the mortgagor is considered as owner of the land ; at law, the estate, on executing the mortgage, is in the mortgagee, and he may, unless restrained by his covenant, enter immediately. 1 Pow. on Mort. 205. 226.

* 1 Pow. on
Mort. 232.

And though a mortgagor, left in possession, pays no rent *, *that* arises merely from the contract, the interest of the money being an equivalent. He is a mere tenant at sufferance to the mortgagee ; for after forfeiture, so completely is the legal estate vested in the mortgagee, that the mortgagor is not entitled to the common notice to quit, which must be given to a tenant at will. The idea of a constant practice to sell, under a fieri facias, equities of redemption, is a mistake ; I never heard of but two instances ; one was settled, the other is now in dispute. The maxim therefore of, *communis error facit jus*, cannot apply. But errors merely acquiesced

† In Lench v. Pargiter, the practice under the lords' act had been one way for 30 years, but was altered the first time the statute came under consideration of the court. Doug. 68.

‡ Way v. Carey, 1 N.Y.T. R. 191.

in, and never disputed, do not constitute the law †. Actions by and against executors and administrators, had been from the date of our revolution entertained in justices' courts ; yet the first time one was brought before the supreme court, they reversed the judgment below ‡. So under the act giving cognizance of plaints. Another instance is afforded by the corporation of New-York. They had for 40 years been in the habits of creating penalties, and giving half to the informer. Suit upon suit had been brought, and recoveries had, yet their right to do this was over-ruled the instant it was attacked in the supreme court. All power of selling under executions at law landed property, or any thing savouring of the realty, is by statute provision ; and what the words of the statute do not cover, cannot be sold. Therefore equities of redemption,

even of chattel interests, in terms of years, are not saleable under a *levari facias*, because the act has not the words "equitable interests." *Burden v. Kennedy*, 3 Atk. 738. *Lyster v. Dolland*, 3 Bro. C. Rep. 478. 1 Vez. J. 431. S. C. will be found to this point, notwithstanding the chancellor's apprehension of its bearing the contrary way. An equity of redemption is not known at law; it is a mere creature of chancery, and cannot be contemplated, therefore, as an object of sale, by a court which does not acknowledge its existence. What is not, according to legal contemplation, in possession, but rests merely in right, cannot be taken in execution. Choses in action therefore cannot be seized on. *Francis v. Nash*, Ca. Temp. Hardwicke, 53. *Impey's sheriff*, 157. On the same principle, goods pawned, demised, or letten for years, are not liable to a *fi. fa.* *Impey's sheriff*, 158. *Audley v. Halsey* *, *Cro. Car.* 148. *Kitchen*, 226. To make an equity of redemption saleable at common law, will defeat the ends of distributive justice. A debt due on a book account, note, or on a bond, is as much a debt in conscience as one on a judgment; but if the decision appealed from be confirmed, one judgment creditor may run away with even the equitable estate, and exclude all the other *bonâ fide*, though simple contract creditors, from every farthing. It has been the policy of our courts to extend equitable assets, because they are appropriated in payment of debts *pari passu*. For this purpose an equity of redemption is considered as equitable assets, not for the purpose of rendering it inapplicable, but that it may be equally distributed. 2 Atk. 290 †. 1 Vern. 410, 1-2 ‡. Vern. 61 §. 3 P. W. 341. *Sir Charles Coxe's case*. 3 Keb. 307. Amb. 308 **. 2 Freeman, 115. 3 Woodeson, 487. It is so perfectly an equitable interest, that in an action against the heir of a mortgagor, he can plead *rien par descent*, though entitled to an equity of redemption. 1 Pow. on Mort. 369. In all cases where land can be taken for debts, the debt must be a lien on the land, and in case of the death of the judgment debtor, after an intermediate alienation, a *scire facias*

of the interest left in the mortgagor. In mortgages for years, the reversion being a legal estate in the mortgagor, attracts the equity of redemption, and gives it the quality of the reversionary interest. In such a case, therefore, the equity of redemption is legal assets. But if the mortgage be in fee, as there is not any legal interest left in the mortgagor, the equity of redemption is equitable assets.

§ *Sauley v. Gower*.

** *Hartwell v. Chitters*.

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* The action there, was *trover* for goods, the question was, whether, after an extent sued out before a commission of bankruptcy against the *connosor* owner, though the *liberate* was afterwards, should prevail against a sale by the commissioners? Held that it should.

† *Plunket v. Benson*.

‡ *Cole v. Warden*. *Plunket v. Kirk*. The distinction between mortgages in fee and for years, was in the three cases above, taken and allowed as to the nature

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goes against the tertenant. But, in the case of a mortgage, then a judgment, then the death of the mortgagor, to a scire facias against the tertenant, he may show title in the mortgagee; which demonstrates the legal estate to be out of the heirs of the mortgagor. The saleability of an equity of redemption is not denied, but convenience demands it should be in chancery. A mortgage may have been for £10,000, and only one thousand due; the registry may show the full amount of the original sum lent to be still owing, and the equity be purchased, under that presumption, for a trifle. The reverse may be the case; double the sum apparent may, from accruing interest, be due, and the equity bought for a large sum, when in fact not worth a cent. Each of these cases may produce a bill in chancery. The mode of coming at equities of redemption is easy, without any violation of principles, preserving at the same time, the true distinction between equitable and legal estates, and the jurisdictions by which they are cognizable. Let the creditor sue to judgment, then, by the analogy adopted in chancery, as the judgment would at law attach on the legal estate, its operation in equity will affect the equitable interest, and an incumbrance be created, which on execution sued out*, will entitle the judgment creditor to his bill against the mortgagee to redeem. 3 Atk. 200 †. 1 Pow. on Mort. 349. 359. 360. 2 Ch. Ca. 170 ‡. This brings the whole matter before the court, which alone can give full relief; the account on the mortgage is entered into; the sum due upon it discharged, and the balance paid over. The Statute § by which trust estates are made liable to debts, will not warrant the decree complained of. That act relates only to fraudulent and covenous trusts, in which the cestui que use has the sole beneficial interest; it is a part of the statute of frauds, and therefore our act declares that* the land shall, under the sale, be held discharged of all such incumbrances. This would defeat the mortgage. The English authorities confine their law of frauds and perjuries, of which ours is a copy, to these trusts, and do not extend them to equities of redemption. 2 Saund. 203. Hard. 467 †. 1 Black. Rep. 145 ‡. Our act, subjecting lands to debts, makes a provision in case the purchaser should be evicted: now, it is impossible for a man to be evicted from an equity of redemption; and if he was by the mortgagee, he would be entitled to

* That is, where the mortgage is of a leasehold or chattel interest.

† Shirly v. Watts.

‡ Griswold v. Marsham.

§ 1 Rev. Laws, 66.

* 1 Rev. Laws, 68.

† Pawlet v.

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‡ Burgess v. Wheate.

1 Rev. Laws, 391.

recompense from the judgment creditor himself. This would make the remedy recur to the same point from whence it set out. In the case mentioned, there could be no *legal* seisin of the interest to be sold, and the form of the execution is of lands "whereof seized*." All that can be obtained against a mortgaged estate by a judgment at law, is an equitable lien; for a judgment creditor cannot tack. 1 Pow. on Mort. 526 to 529. After sale of an equity of redemption by the sheriff, he could not give possession; ejectment would not lie upon his deed, and chancery must be at last resorted to, to give effect to the sale.

Hoffman and Hamilton contra. As the lands and real estate of a debtor may be taken in execution, under our statute †, the words being "all and singular the lands, tenements, "and real estate," the only question is, who is the owner of lands or real estate mortgaged? If the mortgagor was out of possession, we concede the sale would not be valid; and *that* was the circumstance of the case from Atkyns ‡; the termor had parted with the possession. Till the decision in Brown and Vesey, J. the saleability of an equity of redemption on an execution was never doubted; and, in favour of its being vendible under a *fi. fa.* the opinion of Mr. Powell § is a very strong authority. There can be no reason for excluding it from this incident annexed at law to real estates, when it partakes of every other quality which characterizes land. The mortgagee is proprietor of the mortgaged premises only so as to protect his security; against all the world but him, the mortgagor is the real owner. He may when in possession levy a fine**, or suffer a common recovery ††, and must

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* 1 Rev. Laws,
390, S. 9.

† 1 Rev. Laws,
388.

‡ That, however, was not the point on which the decision turned. In King v. Marissal, 3 Atk. 192, it is to be inferred that the mortgagee was in possession; but in Shirley v. Watts, ib. 200, the contrary is rather to be supposed.

§ Pow. on Mort. 339, is the only place where I can discover any law on this point; in my edition, which is of 1799, no opinion is given, and the case cited is contra the extendibility.

** This he may do, without having any interest in the land, and in such a case the fine operates not on the land, but against the parties, by way of estoppel. Anciently, the cognizee was put, on a purchase made, into possession before the fine was levied, and the vendor, by way of security, levied the fine afterwards. 3 Bac. Abr. n. Ed. 194. Under the words of our statute, a fine passed by a person out of possession, will be as effectual against his rights and the rights of his privies, as if he was in possession; for it will be a perpetual estoppel, unless the persons claiming can bring themselves within some of the exceptions. On this principle, the case of Weale v. Lower, Pollex. 54, was determined. Fines *sur concessit*, and cognizance *de droit tantum*, are for the purpose of passing interests where the cognizor has not a freehold in possession.

†† Either to be a tenant to the præcipe, or to make one, it is necessary that the tenant, in one case, or the grantor in the other, should have the legal freehold in possession. 2y. How would a mortgagor, after a mortgage in fee, be considered? The argument, as to a mortgagor suffering a recovery, is as good for the mortgagee. See Palm. 135. Cro. Jac. 593.

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* The generality of this position may, perhaps, be doubted. A fine does not affect any estate which it does not de-vest, displace, or turn to a right. As between the parties and their privies, the intent will control the operation. *Freeman v. Barnes*, 1 Sid. 460. The mere circumstance of there being an existing mortgage, would not, it may be argued, prevent the effect of a fine in barring the mortgagee. If the mortgage be by demise, and the interest regularly

paid by the person in possession, a fine and non-claim would not, I presume, be a bar. *Fermor's Case*, 3 Rep. But should the estate be forfeited, and interest not paid, then it may be a question whether a sale by a mortgagor in possession with a fine levied, would not, after five years, bar the mortgagee. *Saffyn's Case*, 5 Rep. 123. The reasoning in favour of such a result, may possibly be enforced by the case of *Dighton v. Grenville*, *Cruise on Fines*, 246, where the decision of the House of Lords is given, though in none of the Reports of this case has it been noticed. A mortgage in fee may possibly be distinguished; for the mortgagee may, perhaps, there say, *partes finis nihil habuerunt*.

+ It perhaps depends rather on his possession; for if the mortgagee be in possession, he will gain the settlement. *Pr. Ld. Mansfield in the case cited*.

† The King v. St. Michaels.

§ This is in equity; at law it is contra, and on the very principle that the legal estate is parted with by the testator during his life. See 1 Vern. 342.

** This is true in equity, but not at law, for the mortgagee having the legal estate, has the right of presentation; and the mortgagor, to prevent its exercise, must apply to equity. *Galley v. Selby*, Com. Rep. 343. *Croft v. Powel*, *ibid.* 609.

†† While in occupation. 1 Rev. Laws, 274. When he parts with that, he loses his right.

‡‡ He has, when in possession, a right to vote, *ibid.* and note the diversity of expression.

§§ If the decree of foreclosure be opened.

therefore have the legal freehold in him. His fine bars all rights but that of the mortgagee, who is not affected * by five years non-claim; and need not make an entry. 1 Pow. on Mort. 220. In consequence of this ownership of the mortgagor, his interest in the equity of redemption has all the properties of a legal estate. It passes by a general devise of "all" my real and personal estate. 1 Pow. on Mort. 353. It descends; the personal estate is first liable for debts; it may be entailed; it follows the custom in borough English. 1 Pow. 346. Nay, a mortgagor gains at law a parish settlement in consequence of his legal ownership †. Doug. 632 †. Lord Mansfield in that case says, "It would be an affront to common sense to say the mortgagor is not the real owner." But further a mortgagor is not accountable to a mortgagee for profits, even after the mortgage is forfeited. A mortgage in fee revokes a devise only pro tanto. The right of presenting belongs to the mortgagor of lands to which an advowson is appendant **. Our statute book recognizes the mortgagor as the freeholder: he is declared to be qualified to vote at elections in virtue of the freehold †† in him. The estate of the mortgagee ‡‡ has none of these qualities. He has only a qualified right sufficient to protect his debt. To make his title efficient, he must foreclose; but though he do this, and enter, he is considered but as bailiff to the mortgagor, and liable to account §§. If he even assigns his interest, he still continues liable for the waste and depredation of his assignee. A general devise by him of all his estate, will not, even after fore-

closure and possession, pass the lands mortgaged*. It goes to his executors as personalty, and not to his heirs, as the realty would. 1 Pow. on Mort. 438 et seq. He has but a chattel interest. Where then can the fee be, if not in the mortgagor? This is further established, because a mortgage will pass by a will, not attested according to the statute. 1 Pow. 455. The interest of the mortgagee is intrinsically nothing more than what arises from the contract of borrowing, and therefore, when the debt is paid, there needs no reconveyance of the estate to the mortgagor†. This shows the legal estate remains in him, by virtue of the equity of redemption, and is necessarily liable for his debts by sale at common law under an execution. If this would destroy the mortgagee's security, then it could not be valid; but it is not so, the land remains subject to the mortgage. It is not an answer to this reasoning, to say, that our positions rest on chancery decisions. In equity, and at law, the rules relating to landed property are the same. 1 D. & E. 762, per Buller, J‡. Courts of law have latterly been disposed to acknowledge equitable principles, to avoid sending creditors there. On this account the assignor of a bond, though it be a chose in action, cannot, after assignment, release the obligation; nor can even the obligor, after notice, discharge it. The inconveniences of selling an equity of redemption on account of an existing mortgage, are imaginary. They are no greater than in a sale on a third judgment, where there have been two previous ones for the penalties of bonds. The purchaser takes subject to the incumbrance. An equity of redemption is equitable assets§ only in a certain sense: Among those who have no lien on the land; such as on a bill to redeem

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* After foreclosure, if the devise treat the mortgaged premises as land, they will pass by words applicable to real estate. Garret v. Evers. Mosely, 364. So if the will be properly executed according to the statute, "all my estate." Pow. 448. See 1 Pow. ch. 12. See 2 Pow. 692, et seq.

† See Harrison v. Owen, 1 Atk. 520, that to revest the estate, there must be a deed. In Turner v. Richmond, 2 Vern. 81, a mortgage paid off was, as there was no reconveyance, held to protect a judgment creditor against a second mortgagee. This must have been on the principle of the legal estate being in the mortgagee.

‡ Goodtitle v. Morgan.

§ The cases on this point in the English books, seem to be involved in some degree of perplexity. In Sir Charles Cox's case, 3 P. W. 341, and in Hartwell v. Chiters, decided upon the authority of that case, the equity of redemption of a mortgage term, was held to be equitable assets. It appears, however, that it is not; for, as the executor, had there not been a mortgage, would have had the term to apply in a course of administration, it would seem the equity of redemption would go to him also, on the same principle as it is held to pass in cases of real property, to him who would be entitled to the land. Hawkins v. Lawse, 1 Leon. 155, and the cases cited by Mr. Coxe, in his note, 2 P. Will. 344. Whether the equity of redemption in real estate, shall be legal or equitable assets, may perhaps depend on another question; that is, whether the mortgage be in fee, or by way of demise for a term of years? In the former case it has been conceded, that it is equitable, because the mortgagor has parted with all his legal estate, and the pure equity which determines the nature of the assets, is all that

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by general creditors, or in a trust for payment of debts; but not against a judgment creditor who by his very judgment obtains a lien which will entitle him to redeem. 1 Pow. on Mort. 348. To force him to this alone, is a grievance for which our statute meant to afford redress, by permitting him to sell to a person who may be able to redeem. A mortgage contract may be for 10 years, with a covenant that the mortgagee shall not be compellable to receive it before; must a creditor, or a judgment recovered immediately after execution of the deeds, wait ten years? The simple mode is to sell at once under a *fi. fa.* for chancery cannot order a redemption. The argument against selling an equity of redemption because it is equitable assets, is equally forcible against selling trusts; for by the statute of uses they are made liable to be sold by the sheriff. So before the passing that act an heir might have pleaded *riens per descent*, though a covenous trust was existing; yet, since that law has been enacted, such a trust is saleable under execution. Though ejectment on a sheriff's deed for an equity of redemption could not lie against the mortgagee, yet a mortgagor would never, in a court of law, be allowed to set up the title of his mortgagee against the purchaser; and against the mortgagee there would be no claim, because the purchase would be subject to his demand. If a mortgagor may sell, why may not a sheriff? Whatever the debtor can dispose of, his creditor can sell. The remedy given in case of eviction, is where the debt-

remains in him. In the latter, as he retains the legal reversion after the term created by the demise, that interest gives the quality to the assets, rendering it legal, and a judgment of *quando acciderint*, may be had against it. *Massam v. Harding*, 2 Atk. 291. *Bunb. 339.* *Fortrey v. Fortrey*, 2 Vern. 134. If the redemption be equitable assets, it will not, it has been held, be affected by a judgment at law. In the second resolution, in *Deg. v. Deg.* 2 P. Will. 416, it is said, "The premises devised being mortgaged in fee by the testator, and he having nothing but an equity of redemption, could be only equitable assets, and consequently must go among all the creditors equally; forasmuch as a debt by judgment and a debt by simple contract are, in conscience, equal." But this position is a little shaken in the decision in *Sharpe v. the Earl of Scarborough*, 4 Ves. J. 338. It was there ruled, that an equity of redemption is not equitable assets, at least against judgment creditors who have a right to redeem, and that against such the court would never marshal the assets. If this decision went on a principle of rendering equitable estates liable in equity to the same liens as legal estates are at law, it seems to overturn the maxim of the court, that in conscience all debts are equal. If, however, the mortgage was by way of demise, (and the contrary does not appear) then the judgment of the chancellor will not oppugn those of his predecessors. But on these points the learned in the law must make their own conclusions.

or had no title, and the party purchasing is evicted by a prior incumbrance. But it is under *that* we contend the purchase is made. The words of our act are, all lands and "real estate." 1 Vol. Rev. Laws, 388. The form of the execution given is against real estate whereof "seised." There is nothing to restrain the word to legal seisin. The word seisin has an equitable interpretation. 2 Bro. C. Rep. 268. 272. There may be an equitable seisin of an equity of redemption, for it admits of a tenancy by the curtesy, and to create such a tenancy there must be a seisin of the wife. The case cited from Atkyns, and 1 Pow. on Mort. 352-3, show this. We have a complete union of legal and equitable interests; we had the first, and we bought the latter. But whatever may be the reasonings from the common law and English authorities, we rest on the words of our statute, which subjects to sale under a *fi. fa.* "all real estates," without confining the operation of the words to such as are legal only. The English act of parliament furnishes no kind of reasoning against this, it makes land only extendible, and not saleable. Yet under that very law, lands on which there has been an extent upon a statute merchant, may be extended upon an elegit †. Vin. Abr. Tit. Execution, 'M. 1. and the notes. So if a reversidner upon a lease for years acknowledge a statute &c. the rent and reversion will both be extendible ‡. Bac. Abr. tit. Execution, B. page 339. 2 Rol. Abr. 472. Co. Litt. 135. A rent charge § is also extendible. 2 Show. 85. Comb. 391. Our policy makes land more liable than the English code. On a deficiency of personal assets, the court of probates can order a sale of the real **. In the very case of goods pawned, the judgment creditor obtains an interest, 3 Bulst. 17 ††; and though these cannot be taken in execution, that arises only because possession is proof of property, which is not the case with land. It is said we cannot have the benefit of our execution, because in the case put, a *sci. fa.* would not lie against the *tertenant*. This reasoning would equally prevent selling where the legal estate is in the trustee; yet it was never known to prevail against an execution concerning

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† The case was, a connu-see of a statute was put into possession, under the extent, his creditor sued out an elegit against the land while in extent, as well he might.

‡ The reversion being extendible, the rent will go with it, as its incident.

§ It savours of the realty, and land in the statute is held to include any hereditament in the land, & as the connu-see has, by the words of the statute, an estate of freehold in the premises, he may distrain and avow for the rent.

** 1 Rev. Laws, 323. †† "If a man doth gage goods in pledge for £40, borrowed upon them, afterwards the debtor is condemned in £100 debts to another, these goods shall not be taken in execution until the £40 be paid; for the creditor hath an interest in them." The £40 creditor.

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* 1 Rev. Laws,
66.

uses *. A vendee of partnership stock taken in execution for a debt of one of the firm, must, before he can have complete enjoyment of his purchase, discharge the lien of the partner ; yet this has never been urged as a reason against such a sale. The same principle applies to equities of redemption. Our lands do not produce rents, and therefore convenience dictated our law to sell the soil, because possession under an elegit would never pay the debt. The act of the legislature directs the realty to be sold in the same manner as personal estate.

Van Vecten and Benson in reply. The arguments opposed to us are grounded on an application of equitable rights to legal estates. They tend to confound all distinctions between equitable and legal jurisdictions. They subvert established forms which have ever been held the land marks of property. The tenancy by the curtesy spoken of in the case from Atkyns †, cited in 1 Pow. on Mort. 353, was an equitable tenancy, founded on an equitable seisin, and therefore no authority to prove a legal right on an equitable estate. Only legal interests are liable to execution, because the law gives recourse against that only, to which the officer selling can give a legal title. Of lands articed, a man may be tenant by the curtesy, 2 Vern. 536 ‡. But can his interest in such be taken on an execution? Ejectment will not lie for an equity of redemption ; chancery must give effect to the purchase ; therefore on a *fi fa* it cannot be taken, legal rights being always accompanied by legal remedies. The properties of an equity of redemption which it has analogous to an estate at law, such as being descendible, deviseable, &c. can be availed of only before the chancellor ; therefore, the same analogy would say an equity of redemption can be sold only by application to him. But though the equitable qualifications of property may be similar to those of correspondent interests at law, that is only the result of the principle of *equitas sequitur legem*. Not that they are objects of legal cognizance. Lands articed descend ; a contract partly executed, may be availed of in chancery, but not at law, and the interests acquired under neither can be liable to a sale by the sheriff. In the cases of trust made saleable by the statute, no beneficial interest of a third person intervenes, such as the mortgagee has at law. The necessity of a statute § provision to make such estates liable to execution, shows that the words of the law subjecting real estates

† Casborne v. Scarfe & Inglis, 1 Atk. 603.

‡ Sweetapple v. Bindon.

§ Act concerning uses.

to execution could not have been intended to extend to equitable seisin, for then the other statute would have been unnecessary. The right to vote and the right of settlement, which may be exercised and gained by a mortgagor, depend not on his freehold, but on his possession, and when he loses *that*, he loses his right *. Did they rest on his freehold interest, they would be the same, whether in or out of possession; and the act bestowing the right of suffrage, was passed only because without it, even by his possession, as he had no freehold, it would not be conferred. Upon the same principle rests his power of levying a fine; when out of possession, he cannot †, 1 Pow. on Mort. 220; but after a mortgage in fee, can he make a tenant to the præcipe, for the purpose of suffering a common recovery? All his rights depend on his possession; therefore he, like a disseisor, may bring trespass. The reason why partnership stock may be sold under an execution against one of the firm, is, that the vendee may enter into possession with his co-tenant. This cannot be done on an equity of redemption. That a reconveyance of the mortgaged premises is unnecessary, is true only in certain cases. If the mortgagor remain in possession and satisfy the debt when due, in any action, by the mortgagee, he would be allowed to show performance of the condition; and if the mortgage had been given up or cancelled, a jury would, in all such cases, be directed to presume a reconveyance. But if the mortgage is forfeited, and the estate become absolute in the mortgagee, then we say a reconveyance in strictness is necessary ‡. In case of an assignment of mortgaged premises, the mortgagee is liable only when, after a forfeiture, and before foreclosure, he assigns *absolutely*. Not because the freehold is not in him, but because he has exceeded his equitable authority, equity will make him responsible; his right being *there* subject to redemption. That specialty creditors have in equity any preference is a mistake, for unless the judgment creditor first removes the mortgage, he comes in *pari passu* §. When he gains a preference, it is not on the foot of his equitable lien, but because having discharged the legal incumbrance, he stands on his legal rights, and is in some degree a purchaser. 3 Atk. 293. 1 Pow. on Mort. 369 to 374. The argument, therefore, that the present decree tends to defeat equitable distribution, and take away equitable assets, remains

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* Vide ante
page 58, note
††.† Ante page
57, note **.‡ Ante page
58, note †.§ Ante page
59, note §.

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totally unanswered. Chancery requires a judgment creditor to sue out execution, before it will allow him to redeem a mortgaged term, only from the analogy which it constantly preserves to legal principles. Because at law, a chattel interest, like a term, is bound only from delivery of the writ. *Shirley v. Watts*, 2 Atk. 200. 1 Pow. on Mort. 349. But at law even this does not affect it. *Burden v. Kennedy*, 3 Atk. 739. In *Plunket v. Pierson*, 2 Atk. 292, the lord chancellor asked the bar whether an equity of redemption had ever been held liable to an execution by a bond creditor, and the unanimous answer was in the negative. In case of a mortgage in fee, the judgment creditors must give notice to the mortgagee, and request him to receive his money. If he receive it, the mortgage being removed, execution may issue; if he refuse, the creditors acquire a lien on the premises, not by virtue of their judgment, but of the notice. 1 Pow. on Mort. 359, 360. *Greswold v. Marsham*, 2 Ch. Ca. 170. The words of the statute do not say equitable interests; and this is the express ground of the decision in *Lyster v. Dolland*, because acts of parliament, and acts of our legislature, apply only to matters of law, unless their extent be declared. Even the statutes of Bankrupts do not affect an equity of redemption*; for, after the conveyance of the bankrupt's estate by the commissioners to his assignees, he still may redeem. If an execution will attach on it, whether the mortgagor be in possession or out of possession, is immaterial; and yet it is conceded if the latter be the case, it cannot be touched. But allowing him in possession, a sale by the sheriff could convey no title to be enforced at law; for in an ejectment against the mortgagor, as he would be no party to the deed under which the plaintiff would claim, he could not be estopped from showing a paramount title in the mortgagee; and in ejectment you must recover by the strength of your own, not the weakness of your adversary's title. A sale by the mortgagor of his interest in the redemption, for it is not an estate, is merely in the nature of a contract to be perfected in equity. We therefore contend the sale was void in itself, for so completely is the legal estate in the mortgagee, that he has a right to distrain for rent arrear, *Moss v. Gallimore*, Doug. 279, and this even if due on a lease made prior to the mortgage. In this very case too the interest of the mortgagor is in a legal sense, reduced even below that of a tenant at will.

* This is a mistake. Even under the English statute, which is not so full as our act of Congress, an equity of redemption passes by the commissioners' assignment. *Vandenanker v. Desbrough*, 2 Vern. 96. See Bank. Act, sec. 12.

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Spencer, J. Two questions have been raised for the determination of the court: 1. Whether the appellants who are the heirs of Sarah, who was the wife of Henry Wisner, were creditors under the marriage contract, so that, in equity, that contract bound the premises in question to pay those demands, after paying the mortgage given to Beekman? 2. Whether an equity of redemption could be seized and sold by virtue of an execution at law? It will not be expected, that any opinion will be pronounced on the first question. It appears not to have been insisted on in the court of chancery; and although the appellants' counsel would have had a right to argue it in this court, still they have not attempted it. Of course it will, as respects myself, be laid out of the case. The decision of the second question, will require an attentive consideration of our own municipal laws, with such aid in the construction of them, as we may draw by analogical reasoning from the British authorities: for I take it to be well settled, that in England there cannot be a sale of an equity of redemption upon a mortgage for a term of years. It perhaps may admit of doubt, whether an *elegit* or *levari facias* cannot there be served and executed upon land mortgaged in fee, whilst the mortgagor is in possession, and when his right consists of an equity of redemption only. That it was the uniform practice, under the colonial government, to sell under a *fi. fa.* all kinds of interests which the debtor had in lands, including equities of redemption, has been admitted. That this practice continued until the year 1787, has been also admitted. And though the practice cannot legalize a procedure unauthorized or forbidden by the law, yet, in cases admitting of doubt, it may, and ought to be regarded, in expounding statutory provisions, in relation to the same subject. By the statute of the 19th of March, 1787, it is enacted, "that all and singular the lands, tenements, and *real estate*, of every debtor shall be, and hereby are, made *liable to be sold on execution*," &c. This statute was re-enacted among the revised laws, in 1801. The extent and legal operation of the term *real estate*, will, in a great measure, decide the question. Courts of equity and courts of law undoubtedly regard the rights of a mortgagor and mortgagee, in a different manner. In the former, the land is considered as a pledge for the debt secured, and the mortgagor is considered the real owner; in the latter, the legal estate, to some

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2 Burr. 978.

1 Atk. 605.

Ibid. 606.

purposes, is considered to be in the mortgagee, from the moment of the execution of the mortgage, liable to be defeated by the performance of the condition, to wit, the payment of the money. In other respects, the courts of law follow the notions of a court of equity, and consider the mortgagee as holding the mortgage, as a mere security for the money due. Thus it is, that at law, on the death of the mortgagee, the money due is considered as personal assets, in the hands of executors or administrators. So, too, on the death of the mortgagor, his right to the mortgaged property, if he originally had a fee, and the mortgage was in fee, will descend to his heirs, and not to his personal representatives. An equity of redemption may also be entailed; whereas, if it was considered a chattel, it could not be—nor could it, if considered as a mere right. By a devise of all lands, tenements, and hereditaments, a mortgage in fee will not pass, unless the equity of redemption be foreclosed. Again—a husband may be tenant by the curtesy of an equity of redemption. To perfect this right, four things are necessary; *marriage, issue, death of the wife*, and *seisin in fact*. And, as to the latter requisite, it is laid down, that an equity of redemption was not to be considered as a mere right only, but must be taken to be such an estate whereof there might be a seisin. From all these considerations, it appears to me, that a mortgagor's right in an equity of redemption, is to be considered as comprehended within the broad expression of "real estate." I am the more confirmed in this opinion, from the general and almost universal idea and practice which has prevailed for a series of years, as well as from the legislative declaration, that a mortgagor in possession is a freeholder, within the meaning of the constitution, and as such entitled to vote. It has, however, been said by the appellants' counsel, that the form of the execution requires a legal *seisin*, and that a mortgagor cannot be legally *seised*. This exception has already, in some measure, been considered. There are two answers to it: First—the form of the execution ought not to control the declared intent of the legislature, in rendering every species of real estate liable to sale; and on no sound construction can this exposition be admitted. Second—when a statute speaks of a *seisin*, an equitable seisin may be as well intended as a legal one; and the term is applicable to both. I can, there-

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fore, perceive no substantial objection to the sale of an equity of redemption, under an execution at law. Difficulties have been started, in relation to the provision, giving remedy to purchasers evicted for want of title in the person against whom the execution issued; and it is said, that the purchaser can immediately have this remedy, where an equity of redemption only has been sold. If this position was well founded, it would only prove, that the legislature had not foreseen all the cases which might occur under that provision; but it certainly proves nothing as to the right to sell an equity of redemption. I do not, however, perceive the difficulties, which have been pointed out, in the same light the appellants' counsel have. The authority given to the supreme court, after suing out the original and stating the grievance, is, to hear the complaint, and do justice to the parties. Surely it would be attended with no difficulty to decide, whether the equity of redemption sold, was incumbered beyond the amount stated, at the time of the sale; or, whether the purchaser was, in judgment of law, evicted of the equity of redemption he had purchased. Arguments *ab inconvenienti* have been suggested: there can scarcely exist a case, however well settled, where such arguments cannot be urged; they prove nothing, and are to be listened to only in very doubtful cases. In the present case, there would be no more difficulty nor inconvenience than exists every day, where there are several judgments, and the senior judgment creditor is disinclined to a sale. On the whole, I am for affirming the chancellor's decree: but as the present question has never before occurred in our courts, except in one instance, where no decision was made, I do not think that it would be discreet to impose a mulct. The respondent ought to have his costs only.

Kent, J. The right of redemption was contended for in the court below, and again in this court, on two grounds: 1st. That the marriage contract bound in equity the premises in question, to pay the money that Henry Wisner had covenanted to pay; and that the same belonged to the appellant and the other children of Sarah Waters, who were creditors under that contract. 2dly. That an equity of redemption cannot be seized and sold by virtue of an execution at law; and consequently, that the same still exists in the appellant Waters, as a purchaser under the devises of Wisner. I do not

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perceive that there is any basis for the first doctrine. The land in question had no connexion whatever with the subject matter of the contract. There is no instance where an equitable lien has been carried to such an extent. The consideration of the contract did not arise from the land; and there is no equity that this particular land should stand charged with the fulfilment of the contract, when there was no agreement to that effect, and especially as against a creditor or a purchaser, without notice of the contract. The only real question then in this case is, whether an equity of redemption can be sold under an execution at law? This is a point of importance and difficulty; and although I cannot arrive at any conclusion altogether free from embarrassment, I am inclined to the opinion, that, under the act of *our* legislature, an equity of redemption can be sold at law; and consequently, that the decree is correct, and ought to be affirmed. I admit, that under the English law, an equity of redemption cannot be sold by process at law; and yet their decisions have approached pretty nearly to the same thing. According to strict technical form and language, a mortgage in fee is, at law, a conveyance of the estate, and differs from an absolute sale only in respect to the equity of redemption, which is a mere equitable interest. As far as concerns the rights of the mortgagee, these strict formal ideas are fully enforced. Hence a mortgagor in possession is held to be like a tenant at will: he receives the rent by a tacit agreement; but the legal title to the rent is in the mortgagee, who may put himself in possession of it, and turn out the mortgagor whenever he pleases. The mortgagor, in such a case, would not be entitled even to a notice to quit, nor to reap the emblements as other tenants at will are, because all are liable to the debt. But when the mortgagor's rights are not in question, a mortgagor in possession, and before foreclosure, is a totally distinct character. He is regarded as the owner of the land, and the mortgage is treated as a mere incumbrance. He may levy a fine, and thereby bar all the world, except the mortgagee, who is exempted from its operation by the nature of the contract. He may suffer a common recovery, or otherwise aliene the land. It descends to his heirs as real estate. It is deviseable as such. These are all marks of ownership, and go to show, that "a mortgage, until foreclosure, is now considered as a

Cro. Jac. 659.
Keech v. Hall,
Doug. 21.
Moss v. Gal-
limore, Doug.
279.

1 Vent. 83.
Pow. on Mort.
75, 76, 113.
126. 3 D. & E.
88 to 98.

Pow. on Mort.
170.

"personal engagement only, in which the land is merely a "pledge for the money, and remains in the mortgageor to "every purpose, except that of securing the loan." It has, accordingly, been frequently observed by the judges in the court of K. B. that a mortgagee, notwithstanding the form of the instrument, has but a chattel interest, and the mortgage is only a security; that it was an affront to common sense, to say the mortgageor is not the real owner; that the law recognizes his interest, and he has a right to the possession till the mortgagee brings his ejectment; that neither courts of law nor equity lose sight of what the parties intended, and will not look to the mere form of the conveyance, but will consider what the parties really meant by it; that the mortgageor in possession is owner to all the world, and the estate of the mortgagee a mere chattel interest, the same as the money due by the mortgage; that it accordingly goes to his executors, and is deviseable in the same loose manner as other chattels; that the assignment of the debt, or even forgiving it, and that too by parol, draws the land after it, as a consequence. These different and apparently contradictory lights in which the subject is viewed, arise from this circumstance—that, in the one case, the courts speak of the mortgage in reference to the rights of the mortgagee; and, in the other case, as it respects all the world, except the mortgagee. In equity, the mortgageor has been uniformly regarded as the legal owner; and the courts of law have latterly, in many respects, adopted the more rational ideas of *chancery* on this subject. If the mortgageor is to be deemed the owner of the land, as respects his own acts, and as respects the world, subject only to the lien of the mortgagee, it is neither unreasonable nor improper, that courts of law, at the instance of other creditors, should treat the land as his, under the same limitation. There is no more inconvenience in subjecting the land to execution, because there is a mortgage upon it, than there is where a prior judgment has bound it. The vendee, in both cases, will purchase subject to the lien; and he can calculate the value, deducting the incumbrance, as correctly in the one case as in the other. The difficulties suggested on the subject, are not found to exist in practice. The English courts have gone so far, as to consider the equity of redemption of a mortgage of a term, as bound by an execution

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Doug. 632, by
D. Ld. Mans-
field, Rex v.
St. Michael.
1 East. 293.
1 H. Black.
117. 2 Burr.
978-9. Eaton
v. Jaques.
Doug. 455.

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3 Atk. 200.
29 C. 2, adopted,
1 Rev.
Laws, 68.

Babb. 347.

Lyster v. Dol-
land, 3 Bro.
Ch. Ca. 478.
1 Ves. J. 431.
S. C. Burden
v. Kennedy,
3 Atk. 739.

Cro. Eliz. 742.
Ibid. 656.

at law in the like manner as if it was the term itself. A judgment creditor is required to take out execution at law, in order to create a lien upon an equity of redemption of a term, before he is entitled to go into chancery to redeem. The statute of frauds also makes lands, in the hand of a trustee, liable to sale on an execution against the cestui que trust; but this is considered as applicable only to a strict technical trust, and no case has gone so far as to allow an equity of redemption to be sold at law. This seems, however, to be implied in the remark, that a tenant, by the elegit, can redeem an equity of redemption; for, to be a tenant by the elegit, he must have been put into possession by the sheriff. But the question was finally settled in 1781. An equity of redemption was sold on execution; and on a bill to redeem, it was contended on behalf of the purchaser, that an equitable interest might be taken in execution; and that the sheriff's sale was the same as the conveyance of it. The lord chancellor, however, after some hesitation, set aside the sale, on the ground, that an equity of redemption was not liable to be taken in execution under the statute of frauds; although he admitted, that under that statute the sheriff might extend an equitable interest, or in other words, a chose in action. Choses in action are, in other instances, liable to execution at law. Long before the statute of frauds, it was held, that the sheriff, on an elegit, might extend a rent charge, although he could not a rent seek; which, being wholly detached from any right in, or power over, the land, could not be delivered as liberum tenementum. The sale of an equity, with us, must then depend upon the construction of our statute. I have taken this slight view of the English law to show, that if our act be an innovation in this instance on the previous law, there is nothing in it that ought to alarm us, as incongruous or unreasonable; for it is certainly agreeable to the general bent and spirit of the more modern decisions. If I am rightly informed, we have in this state a long and established practice in favour of such sales. This usage is of itself deserving of considerable weight. The practice of selling equities of redemption, with us, is supposed to be at least as ancient as the statute of 3 G. 2 c. 7, in the year 1732. That statute made lands, hereditaments, and real estate, within the English colonies, chargeable with debts, and subject to like remedy and process in

any court of law or equity, by seizing and selling as personal estates. The statute uses the broad expressions of lands, hereditaments, and real estates. They were to be treated exactly as personal property; and it became usual to regard lands and real estates as assets in the hands of executors, and to cause them to be sold on execution against executors. This practice continued down to the year 1786, when it was abolished. Equities of redemption continued to be sold to the time of the first revision of our statute law, when the sale of lands on execution was particularly regulated; and if it had been intended to have abolished that practice, it is probable the act would have contained some explicit declaration on the subject, or at least that it would have used precise and definite terms, that could not mislead, or be misunderstood. But the act of 1787, adopted the same loose latitudinary terms as those in the statute of G. 2. It declares, that all and singular the lands, tenements, and real estate, of every debtor, shall be liable to be sold upon execution, to be issued by virtue of a judgment in any court of record. This whole provision is, therefore, made by the very terms of it, exclusively applicable to a court of law; and whatever interests are included within the description of real estate, they are equally included within an execution at law. And there can be no doubt, I think, but that an equity of redemption will be comprehended in the expression. The form of the execution prescribed by the act, ought not to be construed to control this substantive part of the statute; and, if they cannot be reconciled, the general direction, from the nature of the two provisions, ought to prevail. We have seen, from a case I have already mentioned, that a *liberum tenementum*, or freehold, will include a rent charge, although the fee of the land resides elsewhere; and the word Land, in the body of the execution, will apply to the mortgagor's estate, especially as the word Seisin, in a statute, is frequently construed to apply to an equitable, as well as to a strict legal seisin. The application is always according to the subject matter, and to give the statute complete effect. There were several objections strongly urged to this construction of the act. It was said, that the remedial provision in the other parts of the act, in case of eviction of the purchaser, will not apply to the case of a purchaser of an equity of redemption. I have not been able to

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discern, why the purchaser of an equity of redemption cannot, in the first place, obtain possession of the land, as against the mortgagor or his assigns; and why he may not afterwards be evicted. The judgment is undoubtedly a lien on the land, notwithstanding the mortgage. We have seen, that where a term for years is mortgaged, the equity of redemption is bound by execution in like manner, as if the term had not been mortgaged; and, except where the mortgagee himself is a party, I should doubt whether the mortgagor would be permitted to set up the mortgage in opposition to the purchaser. Where the mortgagee's rights are not in question, the mortgagor is regarded as the owner. A court surely would not permit a jurymen to excuse himself, by denying he was a freeholder, because there was a mortgage on his land. A mortgagor in possession, and before foreclosure, is competent to be a tenant to the præcipe; for he can levy a fine, or suffer a recovery. He is therefore a tertenant; and, in the case stated at the bar, I should incline to think the judgment creditor might have a scire facias against the heir or assignee of the mortgagor. But it is not essential to give any definitive opinion on these points; nor do I wish to be understood to do so—for, admitting that the remedies to the purchaser of an equity of redemption are not as complete as they are in other cases, this will not limit the operation of the positive directions and powers in the act to which I have alluded. It would only be to be regretted, that the remedial part of the act was not extensive enough; and it might lead to legislative amendment. The creditor in England was allowed his extent a long time before the statute provided a remedy for him on eviction. And perhaps similar difficulties might be started, as to the power of a court of law, to give full effect to the purchase of a trust estate, under the statute of frauds; but still the sale thereof, on execution, is not to be disputed. The selling of real estates, and equities of redemption on execution, is peculiar to us; and it would not be surprising, if some of the technical rules of the common law might meet with difficulty in their application to the case. If the purchaser can take possession as against the mortgagor, when in possession, he may defend himself against an ejectment by the mortgagee, by bringing the debt into court. In this way he may protect himself completely at law. The doctrine of

equitable assets (and which was much pressed upon us in the argument) is not, however, affected by allowing the sale of an equity of redemption. It is settled, that an equity of redemption is not equitable assets, as against judgment creditors. Arguments drawn from inconvenience, are entitled to much consideration, in cases of doubtful construction; but, in the present case, I am of opinion they operate in favour of the decree. A very considerable part of the lands in this state, are under mortgage to the loan-offices, and to individuals: it is likely they will continue so; and if judgment creditors are under a necessity in every case of resorting to chancery, for leave to sell the land of the debtor, it would create double suits and double expense, and would lead to much inconvenience and delay. After, therefore, the best attention I have been able to bestow upon this nice and important legal question, and which was argued by counsel in a manner that did much credit to their researches and abilities, I am of opinion the decree below ought to be affirmed. The mortgagor was in possession when the equity was sold, and that formed a material ingredient in the case. This opinion, therefore, is not intended to apply to the case of a mortgagee in possession.

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Swartwout, junior,

} *Appellants,*

And Melancton L. Woolsey, Nathaniel Platt, Robert Cochran, Jonas Platt, Zephaniah Platt, John Bailey, James Kent, William Bailey, James Bailey, and George Ker,

} *Respondents.*

ON appeal from chancery, the case was this: The respondents, excepting Ker, had purchased of one Coll M'Gregor, a large tract of land in the county of Clinton, for the sum of £10,241 10s. Of this £2000 only being paid in cash, the residue was secured by a bond and mortgage from the purchasers, dated on the 24th of February, 1796, payable in four instalments; three of £2000, and the fourth of £2241 10s. the first on the 1st of June, 1798, without interest; the rest on the first days of June, '99, 1800, and 1801, with interest. At or about the time of executing this bond and mortgage, Ker,

If one of many joint mortgagors assign his interest to a third person, who is accepted by the mortgagor in substitution of the assignor, and an indorsement be made on the mortgage and bond, that such third person is ac-

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cepted in lieu of the share the assignor holds in the bond, and is looked to for his proportion accordingly, the land will be exonerated from the proportion of the assignor, on his assignee giving bonds for the balance of an account between the mortgagee and the assignee, in which the assignee is debited for the amount of the proportion, provided it appear that those bonds have been satisfied, notwithstanding such satisfaction be under a settlement made after cancelling the original bonds of the assignee, by giving other securities, and at the time of giving the same, the assignee have notice of an assignment of the bond and mortgage by the mortgagee, made between the first and second settlements.

wishing to buy out the interest of Cochran, agreed with M'Gregor and Cochran, to be substituted in the place of Cochran with respect to his interest in the lands, and also with respect to his responsibility for the money secured to be paid by the mortgage. In consideration of being so substituted, Ker agreed to give Cochran £100 for his bargain, and to repay him his proportion of the £2000 cash, paid to M'Gregor, amounting to the sum of £200. In consequence of these arrangements, M'Gregor lent to Ker the £100 agreed by him to be paid to Cochran, and returned to Cochran the £200 received as his proportion of the £2000 paid down. A memorandum of the purpose with which these transactions were had, was made on the bond and mortgage in these words. "I acknowledge and accept of George Ker, Esquire, in lieu of the share which Robert Cochran holds in the within bond, and look to said Ker for his proportions accordingly. New-York, 24th of January, 1796." Cochran, on this, by the direction of Ker, conveyed his interest in the lands purchased of M'Gregor, consisting of one tenth, to Mrs. Ker. On the 25th of June, 1796, Coll M'Gregor settled an account with Ker, on the balance of which there appeared due from Ker £16,334. In this account M'Gregor debited Ker with £1100, for 2000 acres of land held with Platt and others. In satisfaction of the balance thus struck, and in pursuance of M'Gregor's desire, Ker gave his bond, (£3750 of which had been paid to one William Maxwell,) and for the residue the joint bond of himself and wife, payable one year after date, with interest at six per cent. to Isabella S. Fotheringham, between whom and M'Gregor a treaty of marriage at that time subsisted. Within two months after settling the above account in the antecedent manner, it appeared on a more accurate investigation, that some errors had crept in, which were by consent rectified, and by an indorsement on the last mentioned bond, the amount was reduced to £10,507 0 6d. On the 10th of November, 1796, the bond and mortgage from the respondents to M'Gregor, were assigned by him to the appellant Swartwout, in part payment for an estate. Of this assignment Ker had notice about the last of November, 1796. Swartwout owing a large debt to the other appellant Leake, in order to secure its payment, assigned to him the bond and mortgage from the respondents. From an answer of the respon-

dent Ker to a bill filed against him and others by the assignees of Coll M'Gregor, it appeared that in January, 1798, Coll M'Gregor, (between whom and Miss Fotheringham a coolness then subsisted,) demanded of Ker the bond which he and his wife had executed to her. In consequence of this, Ker obtained the bond from Miss Fotheringham, and carried it to M'Gregor, in whose presence it was, with his consent, cancelled and burnt. Shortly after this transaction, an account was again stated between M'Gregor and Ker, on which the latter was found indebted to the former £10,507, exclusive of a loan of \$5000. In satisfaction of these sums, Ker, with the concurrence of M'Gregor, destroyed a declaration of trust from the latter, for township No. 28, in Jessup's patent. After this, the settlement thus made, was, at the request of M'Gregor, waved by Ker, who, having a bond and mortgage from one Hamilton and others to himself, assigned them over to M'Gregor in full of all demands. M'Gregor died since, insolvent. The bill below was against the respondents for payment of the debt of £8241 10s. with interest, or that they might be foreclosed. The Chancellor ordered that Cochran's one tenth should be considered as paid, and that it should be referred to the master to report, after deducting his one tenth, what was due on the mortgage; and that the same should be paid by the other original obligors. For this decree his Honor thus assigned his reasons:

Mr. President—In my opinion, the mortgage and bond, being the joint act of *all* the parties, could not, as far as respected their respective interests, receive a new modification without the consent of all. It was, however, competent to M'Gregor to receive the portions of one or more of the obligors, and to credit the amount paid, which tho' placed to the account of all the obligors as so much paid of the debt, generally, would, if the whole proportion of the person paying was satisfied, operate to discharge him in any action for contribution between themselves. The operation of *a release to one* of the parties to a joint contract, to discharge all is stricti juris; it is on the ground of a presumed satisfaction, and severance of contract which it implies. But though this is the doctrine of strict law, the same degree of rigour is not extended to devices calculated to produce the same effect in a more circuitous mode. So a covenant not to sue, cannot, it has

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been held, be taken advantage of at law, *by way of release*. It is evidently in the power of a person holding a joint contract, so to direct a suit on it, as to charge only one or more of the joint contractors, and is every day's practice at law; and the only remedy of the persons against whom the recovery is had, is to enforce a contribution from their co-contractors, not affected by the recovery. If however those have already satisfied their full proportions, no injury having arisen to the persons subject to such recovery, there is no point on which they can rest their claim to contribution. If this may be done tacitly, I can discover no good reason why it should not be the legal object of a covenant indirectly to avoid a process for contribution. If the indorsement in this case, had acknowledged the receipt of a sum of money equal in amount to Cochran's one-tenth of the debt, it would not be deemed prejudicial to the interests of the co-obligors; and whether it was actually paid in money, or agreed to be credited, on an arrangement between them, to substitute some other object existing in property or contract, could be of no consequence to any others than those who were the parties to the transaction making such substitution. Assuming it then as legal, as well as equitable, in certain cases to permit the person complying with what is deemed his full proportion of duty on his contract, to be virtually, though not formally, discharged by the agency of the person with whom the joint contract is made, the next question is, What was the operation of the agreement in this instance? The indorsement both in the bond and mortgage is, "I acknowledge and accept of George Ker in lieu of the share which Robert Cochran holds in the within bond." This part of the agreement is inaccurate in its language: it speaks of acknowledging and accepting of Ker, *in lieu* of Cochran's share, which it is said *he holds* in the within bond; but however inapplicable the term *hold* may be, as descriptive of a duty, the former part of the sentence distinguishes, not the person of Ker, as instead of that of Cochran, but with precision, the acceptance of the person of Ker, in lieu of the share of Cochran; this is, in my opinion, a strong mark of the intent. There were ten obligors, and from the silence of the securities as to the inequality of interest, or obligation in discharge of the debt, I think it is a legal inference, that all were equally to contribute to its discharge;

there is no allegation of such inequality, and all the answers concur in representing the debt as an equal one on all the parties. If this is admitted, the share of Cochran was susceptible of exact liquidation by a simple arithmetical process, which only was necessary to reduce it to certainty. If so, the *share of Cochran*, in language, is as little subject to doubt, as if the parties had expressed themselves in the more definite terms, of the precise number of dollars intended to be considered as satisfied; and, whether the acknowledgment was, that he had received a certain sum, or that he had made an arrangement to credit a certain sum, in consequence of Ker's responsibility to him, does not, in my opinion, materially vary the situation of the parties. In both cases, the other parties might be called upon to adjust the difference of payment by contribution, if in the event of a suit on the joint contract, an additional sum should be exacted from him, beyond his proportion. By way of fixing this intent more determinately, it is added, that *he looks* to said Ker for his proportion accordingly. This looking to Ker for his proportion of Cochran's, seems to be in pursuance of the same idea; not that he looked to Ker as a substitute in the contract for Cochran, but to Ker for the proportion of Cochran. Indeed, it can scarcely be presumed, that the parties could have supposed a complete substitution legally practicable; it could not have entered into their imagination, that Ker could be considered as a co-obligor with the others; and if not, the mortgage, being merely a collateral security for its discharge, must be considered as invalid to the amount of the satisfaction on the bond. I do not however mean to assert, that it was not in the power of the parties so to modify this transaction, as to retain the lien on the lands, and virtually to discharge the person of Cochran; yet that if this was done by way of release, it would, in legal operation, destroy the whole instrument, cannot be urged with effect against the mode adopted by the parties. The complainants received the bond and mortgage with the indorsement to them, calculated to disclose the nature of this transaction. Whatever might be the consideration or inducement as to Ker, the contract made with Cochran, and his parting with his share of the land to Ker's wife, was a sufficient consideration as to him; and whatever complexion the business might assume, as between *McGregor and Ker*, the

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right of creditors not being affected by it, it could have no retrospective effect, so as to avoid the contract made with Cochran. As between Cochran and M'Gregor it was conclusive, and it does not lie in the mouth of the complainants, now representing M'Gregor, to set up subsequent transactions, to which Cochran was a stranger, to impeach a bargain which he is interested in maintaining, nor ought they to be permitted to charge the other mortgagors with a sum of money, which the person from whom they derive their rights, has relinquished, as part of the money secured by this mortgage. It cannot therefore be necessary to trace the winding steps of M'Gregor, Ker, his wife, and Miss Fotheringham, detailed in the answers of the latter in another cause, which were used at the hearing; for all those relate to transactions subsequent to the agreement, in consequence of which the indorsement was made, and cannot possibly affect it. The letters of the several defendants are conceived in general terms, and nothing is to be collected from them prejudicial to their interests; for the expressions in these letters would equally apply to half, or a smaller portion of the money secured, if no more remained unpaid; but a better reason is, that supposing Cochran's share satisfied, no act of theirs, as against the other mortgagors, could place it in statu quo, nor could it possibly replace Cochran, as a party liable. And if not, it would certainly be very inequitable to compel them to pay his proportion, without a possibility of resorting to him for a contribution. From this train of reasoning, I am of opinion that Cochran's one-tenth must be considered as paid, and that it be referred to a master to report the sums due, rejecting the one-tenth.

Against this, the appellants contended, 1st, That whatever might be the effect of the agreement between M'Gregor, Cochran, and Ker, upon the bond, at all events, the land remained liable, as Ker took Cochran's conveyance, subject to the mortgage. 2d, That the settlement with M'Gregor, by Ker, was fraudulent, and after notice of his assignment, as was evident, 1st, from the non-production by M'Gregor of the bond and mortgage, at the time of this pretended settlement; and was in itself a sufficient reason to presume an assignment. 2d, From the known insolvency of M'Gregor. 3d, That allowing the first settlement to have been good, still, when the bond to Miss Fotheringham was given up and cancelled, it was

as if it had never been in existence, and then the subsequent settlement was clearly fraudulent, being after notice admitted.

On behalf of the respondents it was insisted, That the words of the indorsement clearly exonerated the land from Cochran's proportion, M'Gregor having thereby accepted Ker as his debtor for that amount. That this was evident, 1st, From the account, in which Ker is charged £1100, for the land held by him, with Platt and others. 2d, The money due on the bond and mortgage, was not payable till the expiration of 2, 3, 4, and 5 years, but on the bond given by Ker it was due in one year. 3d, The return of the £200 to Cochran, evinced a new transaction, in which the original liability of Cochran was done away.

Harison for the appellants. It is contrary to reason, to suppose landed security should be relinquished for personal. The intention of the parties, from the words of the indorsement, was, that the person of Ker should be substituted for that of Cochran, but that the land should remain charged. The estate in it was vested in M'Gregor by the mortgage, and it could not be divested, without a compliance with the condition. It was impossible to effect this by the indorsement; for, nothing short of payment is a performance of the condition. The estate of the mortgagee, on executing the deed, passes out of the mortgagor, and upon common law principles, the mortgagee is seised of the fee, defeasible by performance of the condition. 1 Pow. on Mort. 226. If then the estate was in M'Gregor till performance of the condition, and that condition is now unperformed, the estate thus in him passed to his assignee, from whom we claim, and would be entitled, in an ejectment, to set up this our title. Co. Litt. 206 to 208, b. Till a reconveyance *, the legal estate remained in the mortgagee and his assignees. But it is contended, that the settlement made between Ker and M'Gregor, is equivalent to a payment pro tanto, and conclusive on the appellants. We insist, however, from the facts, that it appears Ker had notice of the assignment by M'Gregor, and that any payment afterwards made by Ker, was in his own wrong. In order to affect with notice, it is not necessary that it should be written †. If the circumstances be such as ought to induce an inference, that an assignment had been made, it is sufficient. The absence of the bond and mortgage, on the

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* See ante
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†.

† Whatever is
sufficient to
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enough. Smith
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489. And if a
mortgagee be
affected with
notice, his as-
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first pretended settlement, was equal to this. But on the second, when the first was cancelled, a new bond and new modes of payment adopted, the notice is admitted. On this point, therefore, if on no other, we conceive the decree must be reversed.

Pendleton contra. It is needless to say any thing on the necessity of a reconveyance, to revest the estate of the mortgagor. For what has been urged on that head, applies only to cases where there has been a forfeiture, and the estate rendered absolute in the mortgagee. Here, however, if the estate is discharged from the tenth of the mortgage money, it is by a payment made before forfeiture. The first instalment on the bond was due in June, 1798. The most disputed settlement by Ker, was in the January antecedent. But the payment, as it in fact was, which then took place, was not of the money due on the bond and mortgage. That had been, as to Cochran and his substitute Ker, previously satisfied by the bonds in June, 1796, at which time M'Gregor was owner of both bond and mortgage. The transaction which then took place was a complete act; and surely at that time he had a right to take payment of his mortgage money in any way he pleased. He did then, on that day, as appears from the account in his own hand-writing, receive, in a manner pointed out by himself, payment of £1100 from Ker, for the 2000 acres of land, held by him with Platt and others, the very identical share of Cochran in the original purchase from M'Gregor. The subsequent assignment to Swartwout could never defeat this payment, thus fairly and fully made. After this settlement, so perfected and carried into execution, whether the bond by which it was effected was destroyed, or in whatever way satisfied, nothing which took place relating to it could revive rights long previously extinguished, and that in favour of persons who then had none. By the words of the indorsement, Ker was substituted for Cochran's portion in the bond; for that portion the land was only a security; when, therefore, that portion was paid by the bond to Maxwell (which has been fully discharged) and the bond to Miss Fotheringham given for the collective debt of Ker, the land was necessarily exonerated. In the indorsement, M'Gregor says he looks to Ker. This is a strong declaration that he does not look to the land. If so, it is a criterion on which the ex-

position of the indorsement is to be made. For in expositions, the intent is the governing principle. 3 Atk. 135 *. And that the intent should be to look to the person of Ker, is not so surprising, if we consider Ker's personal transactions with M'Gregor then amounted to £16,000. Besides, there was an inducement to accept Ker's personal security, and exonerate the land. It accelerated the payment five years. The rate of interest was altered from 7 to 6 per cent. How then could land continue liable for a sum at seven per cent. when a bond was given for the same sum at six? It is plain, that to obtain payment at an early day, the land and one per cent. was given up. To discharge land of a mortgage debt, any common parcel declaration or discharge is sufficient. 1 Pow. on Mort. 187. The indorsement therefore is adequate. Then, if the debt was discharged, the land followed of course. *Martin ex Dem, Weston v. Mowlin*, 2 Burr. 979. On this principle the doctrine of notice will apply most forcibly to the appellants. The indorsement on the bond and mortgage purported an exoneration of the land, and the personal substitution of Ker. The assignees, therefore, of such bond and mortgage, received them after a full notice, written on the instruments. The subsequent payment of a prior personal substitution for the share of Cochran, could not revive those rights, which that personal substitution, and the bonds thereon given, had extinguished.

Hamilton in reply. It is on that subsequent payment we think we have a right to rely. When it was made, Ker had full notice of the assignment to Swartwout. Instead of settling, or paying as it is termed, he should have withheld, till convinced that his payment would not prejudice the rights he knew were transferred to Swartwout. Acting otherwise, evinced a spirit of favouritism. On the point of substitution by the indorsement and conveyance, it must be held, that when Ker took the estate and place of Cochran, he took them with all the liabilities they were under, when held and occupied by him, into whose shoes he stepped. If the payment of a proportion of the mortgage by Cochran, would not extinguish in M'Gregor the right to charge all the land with the residue, it could not, when made by Ker, deprive him of it. Therefore, allowing the substitution in the fullest extent, and the total exoneration of Cochran, that was no discharge of the land. All that can be effected by the payment of Ker, is a diminu-

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tion of the charge on the land, not a diminution of the land charged. If, by his proportion, continuing liable, he pays twice, that is a matter of contribution between him and his co-obligors, but nothing to us, who receive only our original sum. At law, the indorsement could never operate to discharge the person of Cochran; in equity, it might. But in equity it never would be considered as being a pro tanto discharge of the land from the mortgage. Therefore, though equity, perhaps, would not have allowed M'Gregor to proceed against the person of Cochran, it would have permitted a foreclosure against Cochran's share in the hands of Ker. If this would have been endured in M'Gregor, certainly in his assignee. The whole of the settlements relied on, are bonds for bonds, and therefore no payments. The facts, however, warrant a presumption, that the bond to Miss Fotheringham was in consideration of marriage, and as a portion; when the marriage did not take effect the consideration failed, and the money intended to be secured to Miss Fotheringham became due to M'Gregor, as his original property in the bond and mortgage. To pay money for that proportion of the bond and mortgage afterwards to M'Gregor, was to make a payment on that which Ker knew was assigned to the respondent Swartwout. It consequently was done in his own wrong, and we have a right to look for the whole amount from the persons bound, and all the land originally charged.

The majority of the court being of opinion with the Chancellor, for the reasons he assigned, it was ordered that the DECREE BE AFFIRMED.

Spencer, J. contra. The questions arising in this cause, are principally—1st. What is the legal effect of the indorsement made on the bond and mortgage, given to Coll M'Gregor by Robert Cochran and nine others, whereof Ker is not one, in these words, "I acknowledge and accept of George Ker, Esq. in lieu of the share which Robert Cochran holds in the within bond, and look to said Ker for his proportion accordingly. New-York, 24th February, 1796?" 2d. Whether, from posterior transactions, the appellants have lost their right to insist on the mortgage as a security, as well for the nine-tenths, as for the one-tenth part of the money thereby secured, and due from Cochran, provided the above indorsement did not, in judgment of law, operate to discharge Coch-

ran's share due on the mortgage? I shall consider the first question independently of the alleged understanding of the parties. This, for three reasons—1st. Because this is not a controversy between the original parties to that transaction (M'Gregor and Ker), but between the assignee of the former and Ker. When this assignment was made to Swartwout, by M'Gregor, it was for the whole sum expressed in the mortgage. The indorsement, to be sure, was on it; and by the true exposition of that indorsement, was his interest and right acquired in it to be determined, without reference to any conception of the parties, as to the operation of that indorsement. 2d. Because parol evidence, substantially to vary or impugn an agreement in writing, even as between the same parties, cannot be admitted; much less between one of the parties and a third person, who has acquired a right under such agreement. 3d. Because, whatever M'Gregor might say in relation to his understanding of the intent and operation of the indorsement, ought not to be regarded; he having, for a full and valuable consideration, assigned the mortgage as due in toto; his subsequent declarations to the contrary, would evince that he had been guilty of a fraud in that assignment, and this would justly derogate from his testimony. If the rule, that, in assignments of choses in action, the assignee takes them subject to all the equity between the parties, does obtain upon the assignment of a mortgage, and of which perhaps there is doubt, still it cannot reach a case of this kind, where the parties wholly relied on a written stipulation, and must be bound by its construction. The indorsement will not admit of a literal construction. Cochran held no share in the bond, but was held by it to the payment of the sum expressed. M'Gregor accepted Ker in lieu of Cochran, in the within bond, and was to look to him for his proportion accordingly. It is to be recollected, that the indorsement was both on the bond and mortgage in the same words; and it is to be presumed, because universally the case, that the mortgage had reference to the bond; and no reason can be assigned why, when the indorsement was made on the mortgage, Ker should be accepted in lieu of Cochran, as to his liability on the bond only, if the parties had intended that M'Gregor was to renounce the real security he held. The expression of the one, is the exclusion of the other, especially when this indorsement is made on the mortgage, and refers

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to a bond. If collateral facts, existing at the time of the transaction, be resorted to, and if we are to imagine M'Gregor actuated by his interests, these considerations would unite in evincing that it could not have been his intention to waive the security he had, but merely to substitute Ker for Cochran, so far only as regarded personal responsibility. But in making up my opinion on this point, I put out of view these circumstances, and look to the words of the indorsement, as the only true indicia of the intention of the parties. The agreement only extends to the bond, and I cannot say, in contradiction to that, the parties meant the mortgage. Have subsequent transactions varied the case so far, as that either the debt has been forgiven, the bond discharged, as respected Cochran's proportion of the debt, or the mortgage reduced by as much as that proportion? The respondents rely much on the exhibition of an account by M'Gregor, against Ker, in June, 1796, wherein he charged the latter with Cochran's proportion of the bond and mortgage, and also upon the execution of a bond by Ker and his wife, to Miss Fotheringham, by the directions of M'Gregor, as a further security from Ker, for Cochran's proportion of the debt in the bond and mortgage, payable at a shorter period, and at a different rate of interest than was required by the bond and mortgage given by the respondents originally to M'Gregor. These transactions are relied on in two points of view: first, as evidence that Cochran was discharged from his liability; and, secondly, as an extinguishment of the debt so due from Cochran. As regards the first, I am clearly of opinion that the indorsement on the bond and mortgage did not, in law, exonerate Cochran from his liability. In the case of *Rogers v. Payne*, 2d Wil. 376, an action of covenant was brought for the non-payment of a sum of money, the defendant pleaded a discharge, in the nature of a release without deed, in satisfaction of all demands. Upon demurrer, it was objected for the plaintiff, that the plea was ill; for that a covenant to pay money, which is by deed, cannot be discharged without deed, and of that opinion was the court, and gave judgment for the plaintiff. If, then, the indorsement only affected the bond, and if that could not, in law, be discharged without payment or release, it follows, that the indorsement can in no way have effect. As respects the extinguishment, nothing can be more clear or better settled, than that, to extinguish

Yelv. 192. 6
Rep. 44.
Blake's Case.
Gro. Jac. 254.

a debt, something of a higher nature than the debt to be extinguished must be given. To give one bond, for a debt secured by another, is no extinguishment. Had the bond given by Ker and wife to Miss Fotheringham been paid, the case indeed might have been materially changed; but after the assignment of the bond and mortgage by M'Gregor to Swartwout, and after notice from the latter to Ker, the bond to Miss Fotheringham was, at the instance of M'Gregor, given up, cancelled and burnt; and when Ker might and ought to have regarded the notice from Swartwout, that the whole mortgage was his, and he alone entitled to be paid, he proceeded to enter into other arrangements to pay M'Gregor; and now insists on such payment, made, as I conceive, in his own wrong. Had M'Gregor retained the bond given to Miss Fotheringham, after it was in his custody, and then insisted on Ker's providing differently for the payment of it, the case would have been very different from what it is; but that bond was destroyed, Ker then was at liberty to have refused paying M'Gregor by so much as the amount of Cochran's share came to; this he did not, though he had notice; but afterwards, at a different time, satisfied M'Gregor; first, by a sale to him of lands at 100 per cent. more than they cost him; and subsequently, by assigning another bond and mortgage. I have paid due attention to the authority cited by the respondents' counsel, and I agree with him, that a mortgage may be discharged by parol, or may be forgiven, because it is not a conveyance of land within the statute of frauds; but this mortgage has never been discharged, or forgiven, or paid, until after it was assigned. I agree further, that the payment of the money will draw the land after it, provided the payment be to the right party. A bond, however, cannot be so discharged. On the whole, it appears that the appellants or respondents must lose so much as the share of Cochran amounted to. The appellants gave a full consideration for the mortgage; the respondent Ker has paid to the amount of Cochran's share, but he so paid it to a person not having a right to receive it, with full notice not to pay him; he paid it, too, without any legal necessity, consequently he ought to pay it again, and to the right person. I am of opinion, that the decree ought to be reversed, and that the appellants be permitted to insist on a foreclosure, as well for the amount of Cochran's proportion of the debt, as the residue of the mortgage.

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A turnpike act, incorporating a company, with a clause vesting the road, on a certain event, in the people, is a public act, not a mere subscription to stock in a Turnpike Co. where a part of the amount of each share is ordered to be paid at that time, gives no interest in the stock if the money be not paid, and the company cannot bring an action for the amount, as it is nudum pactum. A clause of forfeiture of shares subscribed, takes away the right of suing for them, or money ordered to be paid upon them.

ERROR, on the judgment of the supreme court in a suit between the same parties, in which the now plaintiff was defendant below, and the now defendants, plaintiffs. The case was, as reported in 1 Caines's New-York Reports, 381. Upon the decision there pronounced, the plaintiff assigned the following errors. 1st, That the action being founded upon the act entitled, "An act to establish a turnpike corporation, for improving the road from New-Lebanon to the city of Hudson," passed the 3d of April, 1801, as set forth in the declaration, it is not alleged, nor in any way stated, that the said Thomas Jenkins, at the time of subscribing, or at any other time, paid to the said commissioners ten dollars, or any other sum of money, on each, or any share of the said stock, by which the said Thomas Jenkins would become entitled to the said shares. 2d, That it does not appear by the said declaration, that the parties were mutually bound to each other; but that the said commissioners were at liberty, at any time before the surrendering up to the said company the said subscription, to erase the name of the plaintiff from the said subscriptions, and to receive others in the place thereof; nor does it appear that the said commissioners, or the said president and directors, ever did any act before the commencing the action below, by which they were bound, or in any shape liable to the said Thomas Jenkins, for the said stock, by virtue of the said subscription. 3d, That it does not appear in the said declaration, that there was any determination of the president, directors, and company of the said turnpike, for the payment of the said several sums of money by the said stockholders, according to the conditions and terms of the said subscriptions. 4th, That the promises set forth in the said declaration are void, for want of consideration. 5th, General errors. On these grounds it was insisted the judgment ought to be reversed.

The defendants contended, it ought to be affirmed for the following reasons. 1st, Because it does not appear on the record, that ten dollars was by the act required to be paid on each share subscribed, and, as it does not appear, it cannot be

assigned for error. 2d, Allowing it might be so assigned, as the obligation prescribed by the act is to the president, directors, and company, for the whole amount of twenty-five dollars upon each share, and as the payment of ten dollars upon each share was for the benefit and use of the company, the non-payment of this latter sum cannot be assigned by the plaintiff as an objection to the payment of the former, because he would then be permitted to take advantage of his own wrong. 3d, Because the commissioners were authorized only to receive, and not erase subscriptions, and by admitting the subscription, were bound to consider the plaintiff a stockholder, until they should declare his shares forfeited; and by their calls upon him for his instalments, they acknowledged his right to call on them for dividends. 4th, Because the president and directors are the only organs, through or by which the affairs of the company can be conducted. 5th, Because the subscription passed to the plaintiff an interest and right in the stock of the company, by virtue of which he was entitled to dividends, and created therefore a consideration sufficient to support his promise, for breach of which, the action was brought.

Woodworth, Att'y-General, for the plaintiff. Against going into the first error we have assigned, the defendants insist, that as the circumstances we there rely on do not appear on the record, we cannot avail ourselves of them, though they are specified and required by the act of incorporation, under which the present suit was brought. To decide on the force of this objection, we must inquire whether this be a private or a public act. If it be the latter, then the court must take notice of it, and we may avail ourselves of all its provisions. It is not necessary to plead a general statute, 19 Vin. Abr. Letter C. pl. 8. And every statute is general which may apply to every man. Ibid. in notis. This is clearly such a statute, for every man may be a stockholder, and every man may use the road, and must pay. So every act which concerns the King, though the matter of it relate to individual persons or things, is a public statute, of which the judges ex officio must take notice. Therefore the 2 Ph. & M. concerning the trade of a dyer, is held to be a public act, because the forfeiture goes to the King. Ibid. pl. 11. in notis. Within this principle, the act in question must be a public act, for, after a certain pe-

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rior *, by the 12th section, "the right, interest, and property of the said road shall be vested in the people of this state." Also, by the act ordering the publication of the laws †, the persons appointed to revise them, were directed as a matter of "duty," to insert in a separate volume, the titles of acts of a partial or local nature. In executing this direction, they have, in the 2d vol. Rev. Laws, 518, placed under a particular title of "special ‡," many laws; but amongst them this is not inserted, and therefore they must have considered it a public statute. The court below have acted on this as a public law, and referred to it in their decision, in consequence of the counsel now opposed to us, having in their argument treated it as a general statute. On the face of this law, it will not support the present suit. It prescribes a peculiar remedy, on failure of the party subscribing for stock. His shares are to be forfeited. It was not therefore the intention of the legislature to permit an action at law. The loss of the ten dollars ordered to be paid, to raise a fund of \$20,000 to commence the road, and the forfeiture of the share, was the punishment inflicted by the act for a non-compliance with the subscription engagement. The subscription created no contract, and gave no rights. It was merely to ascertain the stock taken up. But at all events, to acquire a right in that stock, the payment of \$10 was necessary, and ought to have been averred. Without payment, the contract was nudum pactum, as it could not be enforced against the corporation. To give a right, two acts were made necessary, subscription and payment. A compliance with one, gave no title to demand the stock, and unless both parties were bound, there was no contract in law. *Cooke v. Oxley*, 3 D. & E. 653. The consideration must be apparent on the record, and set forth in the declaration. That the promise is stated to be in writing, is not sufficient § to show a consideration. *Rann v. Hughes*, 7 D. & E. 350, over-ruling in this point, *Pillans v. Van Meiorp*. Wherever one thing is to be the consideration of another, though there be mutual promises, performance must be averred and proved. *Callonel v. Briggs*, 1 Salk. 112. The payment of the \$10 ought, therefore, to have been expressly stated, as it was the sole ground of right against the company. For, unless it was by this means acquired, the payment of the \$10 would have been without consideration.

* After payment of principal and interest at the rate of 14 per cent.

† 1 Rev. Laws, 620.

‡ 2 Rev. Laws, 518.

§ See the note in 1 N.Y.T.R. 386.

The payment of these \$10, was a condition precedent; therefore, till that was performed, no right could accrue to Jenkins. 1 Salk. 172 *. Goodison v. Nunn, 4 D. & E. 761. The declaration therefore should show a tender and refusal of the stock. The same doctrine is found in 1 Vin. 338. tit. Actions of Assumpsit. (Z. 3.) It is not enough to state the demand of \$5, on an order by the president and directors. This does not evince that the plaintiff had the stock; and if he had not, he was not obliged to pay the order. The not setting forth a due consideration, is matter of substance, ever available of, and not cured by, a verdict. Foster v. Smith, Cro. Car. 31. 1 Sid. 182 †. Cro. Jac. 503 ‡. Doug. 679 §. With respect to the order of the president and directors, it is sufficient to observe, that delegated authorities must be strictly pursued. The power is given to the president, directors, and company, and though only the two former may be the active parties, the order should have been in the names of all. The defendants relied in the court below, on the contract of the now plaintiff; let them therefore confine themselves to it, and show the breach within its letter.

Williams, and W. W. Van Ness, contra. This is an action upon an express written contract, subscribed by the plaintiff in error. Its form is prescribed by the act incorporating the company. Its terms are explicit and intelligible, and the legal obligation imposed by it, equally clear. The plaintiff, conceiving that sufficient matter in law did not appear upon the record in this cause, to support the judgment of the court below, has assigned four specific causes of error, to which is added the general assignment. In order more clearly to comprehend the force of these objections, it will be proper to read the contract on which the action is founded, as stated in the declaration. "We, whose names are hereunto subscribed, do, for ourselves, and *our legal representatives*, promise to pay to the president, directors, and company of the Union Turnpike Road, the sum of twenty-five dollars for every share of stock in the said company, set opposite to our respective names, in such manner and proportion, and at such time and place, as shall be determined by the said president, directors, and company." Before examining the errors assigned, it may be necessary to state what may be assigned for error, and whether that which is contained in the first error

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* Thorpe v.
Thorpe.

† Cooke v.
Samburne.
‡ Lenneret v.
Rivet. Where
two considerations are declared on, performance of both must be alleged; and if one averment be good, and the other bad, judgment on a general verdict will be arrested.
§ Rushton v.
Aspinall.

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can be the subject of such assignment: that is, whether matter dehors. the record can be assigned for error, and whether the matter now assigned does appear on its face. The errors all point to supposed defects in the declaration. But if we can show, that what is now assigned, could not have been urged in arrest of judgment, then the court will not reverse the judgment. It does not appear, *from the record*, that the act contains one word of payment to be made at the time of subscribing. It alleges only, that the plaintiff did subscribe; not that any sum of money was to be paid. Therefore, nothing respecting non-payment can be assigned for error, unless permitted to search the act and travel out of the record. The rule is, nothing extrinsic, nothing which does not appear on the face of the record, can be assigned as error. It is laid down, in 3 Black. Com. 407, "that a writ of error lies only upon matter of law arising upon the face of the proceedings." So, 3 Woodes. 359, 60, "if either party be dissatisfied with the judgment of the court pronounced, either on demurrer or arrest of judgment, (which, as already mentioned, must relate to some matter apparent upon the face of the record) the record may be removed, by writ of error, into a superior tribunal, in order to the reversal or affirmance of the former judgment." A further reason why the first error assigned cannot be maintained, is, that it discloses matter which ought to have been pleaded; and it is a general rule, that what may be taken advantage of by plea, cannot be assigned for error. Com. Di. tit. Pleader, (3 B. 16.) Cro. Eliz. 4 *. In the present case, the declaration did not state the act as ordering payment of the \$10. The now plaintiff, to avail himself of it, ought to have disclosed it by way of plea, and then we might have traversed, or demurred, or taken issue on the payment. It was enough for us to set forth only so much of the act as made for ourselves. A declaration need recite no more of a statute than is pertinent to the action. Com. Di. tit. Pleader, (2 S. 3.) Ibid. Action upon Statute I. The residue should have come from the now plaintiff. In Potter v. Read, Cro. Jac. 139, a second error assigned, was, "because the plaintiff founded his action upon the statute, and recites only such part thereof, whereby he would charge the defendant generally, whether he hath as-sets or not; and it appears, by the other parts of the act

* Margaret
Marshall's
case.

“pleaded by the defendant, that he is not chargeable, unless he hath assets of the money received upon the sale of the lands, or woods, or debts of Sir T. G. so, the statute is not fully recited by the plaintiff. Sed non allocatur, for the plaintiff reciting what made for his advantage, the defendant may plead the residue if he will.” The same doctrine is found in Cro. Jac. 506 *, and in Cowp. 665 †. That this is a public act, we deny on the authority of the act cited by the Attorney-General, 1 Vol. Rev. Laws, 620. By the first section, all the public acts are directed to be contained in the first volume of the laws. This act is not there. It is within the description of a private act. Com. Di. title Parliament, (R. 7.) 4 Rep. 76 †. A Turnpike act is no more a public statute, than one incorporating a bank. As to the clause, by which it is enacted, that on a certain event the road shall go to the people, it means no more than that it shall become a common road again. But allowing that the declaration is not so full as it might have been, it may be questioned whether any advantage can be taken of it now. After verdict, many imperfections are cured, which would, if urged before, have been fatal. 3 Black. Com. 394. 1 Sell. Prac. 523. 2 Wills. 261 §. 3 Burr. 1725, Weston v. Mason. For then, every thing will be supposed proved, which must at the trial have been established, to entitle to a recovery, 1 Wills. 255 **. On the point of consideration, there can be no doubt; mutual promises are sufficient in law to create good considerations. These, by the subscribing the note, were raised. On the one hand the plaintiff promised to pay, and on the other, the company promised to receive him as a stockholder. Suppose a man sells a horse for \$100, and \$10 to be paid down; in a suit by the vendor, can the vendee say the contract is annihilated, because he did not pay the \$10? The words legal representatives evince, that the payment was not to be simultaneous with the subscription. The legislature intended the bargain and contract to be complete, on the mutual promises resulting from the subscribing. The clause empowering to cause to be forfeited the shares of any defaulter, was introduced to give a new and superadded right to the corporation, which was not incident to their nature. It was a cumulative remedy. But this does not abrogate their inherent right to sue on all contracts made with them. A lessor may have a

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remedy on his covenant, without losing his right of distraining, or re-entry. So that possessing one remedy, is no argument for losing all others. The order made by the company is stated according to the only manner in which it was possible to have been made; that is, by the president and directors. They were the constituted agents of the company, and to state their acts in the line of that agency, is to state the acts of the company.

Harison, in reply. The act furnishes no one word to authorize the idea that the subscriptions are recoverable by suit. In actions founded on statutes, the rule is, that where no remedy is given, the common law will interpose and afford one; but where the statute prescribes a remedy, no other can be resorted to. Saying the remedy is cumulative, is a violation of all principles. On the point of consideration it is manifest, that had Jenkins brought an action against the president, directors, and company, for his proportion of the toll, they might have replied the non-payment of the \$10; and it would have been conclusive. If so, they were not bound to him, and consequently he was not bound to them. This, then, is a clear nudum pactum ex quo non oritur actio. *Cooke v. Oxley*, already cited. Two acts were necessary; subscribing and paying. To take this case out of the general rule, it ought to be shown, that the shares vested by the subscription. *Latham v. Barber*, 6 D. & E. 67. Allowing however the contract to have been good, the judgment must be reversed; for the order set forth by the pleadings is not in conformity to the contract relied on. It is to pay according to the order of the president, directors, and company; the order is by the president and directors. If I engage to pay according to the order of A. and B. you must show that A. and B. made an order. If not, a defective title is shown, not an actual title defectively set forth. This is a fatal circumstance, and not cured by verdict. *Rushton v. Aspinall*. Doug. 679. 2 Lev. 152*, and the cases cited by the Attorney-General. The company have not pursued their power of making the order according to the words of the act. It is a delegated authority, and must be strictly pursued. *Fronting v. Small*, 2 Ld. Ray. 1408. 2 Bac. Abr. 7, 8. This also is conclusive against the judgments.

Lansing, Chancellor. The first point to be determined, is, the class to which the act of the legislature, on which this action

* *Wise v. Wise*.

has been brought, is to be assigned—If a public act, every part of it is, in legal intendment, in the knowledge of the court, as *the general law of the land*. If a private act, it can only be so far attended to, as the parties, by their pleadings, have made it an object of judicial cognisance. Amongst the English legal maxims, we find, *that every statute that concerns the king, and every statute that relates to all the subjects of the realm*, are public statutes. All highways, as contradistinguished from private ways, are common to all the people of the state, and concern them generally. A new creation of a highway, or a new modification of an ancient way, as in the case of a turnpike, does not affect the mode of using it generally. It is still a highway, in the preservation of which, all citizens are interested. It contributes essentially to their convenience. The toll is merely exactable for its construction, maintenance, and repair. In all other respects, the right of using it as a highway, is unimpaired. The people of the state, who, in their collective capacity, have succeeded to the rights of sovereignty, are also entitled to the reversion, after the sums charged on the Turnpike are satisfied. These considerations rather incline me to think, that this statute ought to be considered as a public act; but, for the purpose of this argument, I do not suppose it necessary to be very nice, in discriminating between public and private acts. For, though it is true, that private acts must be specially pleaded, the plaintiffs in the court below, by their allegations, have so far placed the act, on which this action is founded, before the court, as to enable them to examine the statute, to discover whether the ground on which they relied can sustain their action. They have referred to the statute by its title, *which is the name or description given to it by its makers*, and though the plaintiff need not recite more of the statute than is necessary to support his action; and though it is laid down, that a misrecital, which does not go to the ground of the action, is helped after verdict by the statute of Jeofails; yet it is requisite, that he should show that the ground of his action is consonant to the provisions of the statute, to which he has thus generally referred in pleading, and so far forth as it is material to show the ground of his action, he has given it the property of a public statute. This is clearly distinguishable from showing an exception by pleading. In that case the plaintiff only shows

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pike Co.10 Co. 57.
4 Rep. 77. Hol-
land's case.
8 Rep. 28. 138.
Hob. 227.6 Mod. 62.
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kins.Freeman, 428.
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Sty. 231.

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his right of recovery generally, and the defendant must, by pleading, bring himself within the exception. In that case, the record will always consist with the statute. In the other, an action may be sustained, which, from a mere comparison of the record with the statute, will show a recovery without right. I mean now to consider, 1. Whether the contract in question is a valid one? 2dly. Whether an action is sustainable by the defendants for the sums required from the stockholders? From the record it appears, that commissioners were appointed by the statute to perform certain duties, particularly prescribed. They were to *receive* subscriptions, and to *receive*, for the benefit of the defendants, \$10 on each share of the stock of their Company. The plaintiff subscribed, but it does not appear that he paid. At the time these steps were taken, *the Corporation*, described in the act, was not in existence. It was incapable of contracting. The acts to be performed by the commissioners were merely preparatory to its creation. To give effect to their acts, their power must be strictly pursued. They had no discretion, or latitude of action; their line of conduct was marked with the utmost precision. They were directed to exact from the persons, who were to be admitted members of the Corporation, both *subscription and payment*, as a condition precedent to their admission. If they omitted either to *subscribe*, or to *pay*, they did not come within the terms of admission. If so, the bare act of subscription was wholly nugatory. The subscribers, who were to meet, could only constitute themselves such, within the intent of the statute, by a compliance with the terms prescribed by it. When the Corporation was organized, the Directors might dispense with the exaction of the first payment. But if they did so, there was no ground for extending the doctrine of relation to the transaction, so as to bring it within the rules applying to mutual contracts. For, if the doctrine of relation is to be applied, it will carry it to a period beyond the existence of the body politic with whom the contract is supposed to have been made. If the defendants had affirmed the contract, in all the time intermediate *the affirmance and the subscription*, the contract had been suspended. Now, it is a well established rule, that, to give effect to mutual contracts, a unity of time, as to their commencement, so as to bind both parties from the same point

of time, is essential. It did not constitute a contract; for, the contract, if any, was, "I agree to pay \$25 for every share I acquire by this subscription," and *if none were acquired, none were to be paid for*. This result would render it unnecessary to examine the second point; but I shall cursorily remark, that if the subscription was efficient in the first instance, I have no doubt but that the defendants might resort to their action, as a cumulative remedy, and that they had their election either to sue, or exact the forfeiture prescribed by the statute. This is an affirmative statute; it prescribes a form of contract, which, if so entered into as to bind the parties, at the time of consummation, without any aid from the statute by other express provision, would entitle the defendants to maintain their action. It is a *maxim* in the common law, that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law. Therefore the plaintiff may either have his remedy by the common law, or upon the statute. For the reasons given, I am of opinion, that the judgment in this case ought to be reversed on the first point.

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2 Ins. 200.

L'Homedieu, Senator. The act establishing this corporation directs, that every subscriber shall, at the time of subscribing, pay unto either of the commissioners the sum of ten dollars, for each share so subscribed. The material question in this case is, whether a subscriber, refusing to pay the money subscribed, is liable to an action for the money subscribed; or, whether forfeiture be not all the punishment. This act, being made for a particular purpose, ought to be strictly pursued; and as there is no remedy given, except the forfeiture, that forfeiture is the only thing the corporation can insist upon. In this case, the subscriber refused to pay the money the law declared should be paid at the time of subscribing. If this was not done, it was a nudum pactum, or void compact. The plaintiff, by this, forfeited his right to be a stockholder; and, in case the stock had rose, the company would have been under no obligation to have considered him as a stockholder. This is, I believe, the first instance of a suit's being brought on a subscription to a turnpike or canal corporation, on account of a refusal to pay the subscription money. This shows the general sense of the community, in respect to such subscriptions. Many instances of this kind in the canal company, in-

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insurance companies, banking companies, and others, have taken place; and if the doctrine of subscribers' being liable to pay up the shares in such navigation companies to which they have been subscribed, be once entertained, it would be ruinous to many; contrary to the intent and meaning of the parties, and the obvious construction of the law. The determination of this court will settle the rule in regard to corporations which are formed, or similar ones which may be created, as to bringing suits on subscriptions. If the defendants are suffered to recover, it will open a wide door for numberless suits, if the corporations are disposed to bring them. By the contrary rule, no inconvenience will accrue. In this case before us, we have no facts to show why the subscriber refused to pay the money subscribed by him. But whatever reason he had for his conduct, I am of opinion he had a right so to do, by the fair construction of the act; and that the judgment of the supreme court be reversed.

Judgment reversed, the court holding no action would lie.

Robert Furman, *Appellant*,
And Jesse Coe, Samuel Coe, and William Coe,
Respondents.

On a discovery of new evidence after a decree in chancery, the application ought to be for a bill of review, and not for a rehearing. When the competence of witnesses examined is the cause of application, it ought to be by bill of review; when their credit, by articles. If an executor or trustee be robbed of trust money, it is a good answer to a bill for an ac-

ON appeal from Chancery. Robert Coe, the grandfather of the respondents, by his will empowered his executors, William Furman and William Howard, to sell and dispose of all his real and personal estate, *at such time as should be judged most advantageous for his children*. He directed also, *that his daughter Mary Coe's children* (the respondents) *should have the same quantity of money between them as their mother, the said Mary Coe, should have had for her portion, had she survived; that is, to be equal with the rest of his daughters, such share to be left in the hands of his executors, to bring them up*. On the death of the testator, Howard, refusing to act, William Furman alone proved the will; and in pursuance of the authority it contained, being about to sell the estate of the testator, some of the legatees who were of age objected to it, urging, that, from the then existence of the revolutionary war, the land would sell to a great disadvantage; and that, as several robberies had been committed in the neighbourhood, the keeping

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the money it might bring would be attended with danger; but that if a sale was to take place, it ought to be at auction, as in that manner a higher price would be obtained. The executor, however, without attending to these remonstrances, proceeded in the disposition of the real and personal estate of the testator, which he sold in the month of May, 1779, at private sale, for £3158, of which sum the real estate produced £3000. On the 3d of August following, the executor divided the money arising from the sale among the legatees, according to their interests under the will, and took from those who were of age a receipt in full, for all their shares and proportions respectively; but the part belonging to the respondents, the eldest of whom was not then six years old, he, according to the directions of the will, retained in his own hands. In 1783, William Furman, the executor, died, and the appellant, his son, having administered on his estate, the respondents filed their bill against him, for the recovery of their legacies, under the will of Robert Furman. To this the appellant put in his answer, insisting on a total exoneration, in consequence of his father's house having been broken open by some robbers, who took away all the money then in his father's possession, including that belonging to the respondents, no part of which had ever been recovered. On the examination of witnesses, the fair character of the executor and the robbery were fully established. The testimony of one witness went to show a recovery of the money, from an acknowledgment of the executor in conversation with him. It was also in evidence, that William Furman had refused to advance to Susannah Coe, with whom the respondents lived, any thing for their support, saying no person should have money from their legacies, until they should come of age. It appeared also, that William Furman had let out the real estate of his testator for two years. Upon these circumstances, the Chancellor had decreed, to the respondents, their full proportion of the real and personal estate of Robert Coe, without any deduction; and also their proportion of two years rent of the real estate, with full interest on the whole, to be computed at the expiration of three months after the sale of the testator's property. After pronouncing this decree, the appellant presented a petition for a re-hearing, setting forth, that he had since discovered that two of the respondents' witnesses (whose depo-

count. If the executor or trustee be dead, his personal representative may avail himself of it, tho' it want the corroboratation of the oath of him whom he represents.

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sitions were read at the hearing of the cause) were, at the time of their examination, interested in the event; and that one of the respondents died before the hearing, having bequeathed his interest, under the will of Robert Coe, to the witnesses in question. The petition having been dismissed with costs, the appellant presented another for a re-hearing, in which he stated that Susannah Coe had, with two of the respondents, resided on the real estate of the testator, from May, 1778, till it was sold; and that, during the war, it was very difficult to put money out at interest; that when it could be done, it was at a very low rate; and that, at no time from thence to the present day, had money been loaned at 7 per cent. This petition being also dismissed with costs, the appellant appealed, as well from the orders thereon, as the decree in the cause. Bogert, for the appellant, having opened the case, his Honour the Chancellor proceeded to assign his reasons:

Mr. President—Four questions have been discussed in this case, as material to a decision between the parties. 1st, Whether the sale of the real estate by the executor was bona fide? 2d, Whether the fund, destined to the support and education of the complainants, was inequitably withheld? 3d, Whether robbery can legally operate to discharge an Executor? and 4th, Whether the evidence of the robbery in the present case is competent to his discharge on that ground? The will vested a liberal discretion in the Executors as to the time of sale. They were authorized to *sell the Testator's real and personal estate, at such time as should be most advantageous to the children of the Testator.*—He died in 1777; the sale of the real estate took place in 1779. It is perhaps difficult, at this late day, to appreciate with accuracy the motives to the sale, at the time it took effect. It was at a period of great public commotion; when the operations of contending armies had affected the value of real estates very essentially; when that species of property, from the circumstances of the times, and the repeated depredations of lawless men, was, however, to be preferred, as a permanent fund for the support of persons incapable of managing their own concerns, to the less secure investment of money. These considerations it seems were fully brought into the view of the executor, by the representations of some of the persons *beneficially* interested under the provisions of the will; they were disre-

garded, and the sale persisted in. Yet from a review of all the depositions, I think the rational result drawn from the whole collectively, is, that the Testator's real estate was not sold much below its value. Several of the witnesses depose positively to this. Those who differ, either mention in indefinite terms that it was sold below its value, or, if they define the sum, they connect the advanced price with a sale at auction, to which the executor was not bound to have recourse. This, combined with the circumstances that all the other devisees, capable of acting for themselves, immediately acquiesced, received their dividends of the consideration money, and executed acquittances, I think, may well be admitted to close the examination as to this point; for, though their acts generally cannot operate to the prejudice of the complainants, *on this point*, they speak an unequivocal language as to the fairness of the sale, as they are not even suspected of collusion with the executor. As to the second point, this is important in one view of the subject. For, if the executor, regardless of the obligation he had incurred by taking upon himself the execution of the will, refused to provide for the support and education of the complainants, he may be chargeable for such breach of trust. The complainants have specifically charged this refusal in their bill, and the defendant, in his answer, avows his ignorance of any advance, for that purpose, by his intestate. The will directed that the shares of the complainants (Mary's children) should be left in the hands of the executor *to bring them up*. The children, all the witnesses examined to that point concur, were of a very tender age, at the time of the death of the testator. Susannah Coe swears that she brought them up; that she lived within two miles of the executor; that she several times called upon him for some portion of their share of their grand-father's estate, for their support and education; that he positively refused, without assigning any reason, to advance any, till they arrived of age; that the complainants were in want of clothing, and other necessities; that this was after the sale of the real estate, and after some of the devisees had been paid. Robert Moore, John Moore, Hezekiah Field, and Sarah Leverick, confirm the account of the infancy, destitute situation of the complainants, and their being supported by their grand-mother, aunt, or some other of their relations. The executor has been proved

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to have sustained a fair character, by all the witnesses examined to that point; but the circumstances of his retaining the fund destined to support and educate the orphans, whose interests had been committed to his charge; of his observing them thrown upon the bounty of their relations, destitute of clothing, and in want of necessaries of life, and this, in direct violation of the trust he had undertaken, are calculated to throw an air of suspicion on the whole subsequent transaction; and, as far as part of the fund was necessary to be applied to their subsistence and education, it would clearly make him liable, whatever might be the consequences of the robbery as to the residue. As to the third point; in 2 Fonb. 191, it is laid down as a result deduced from the cases bearing on this question, that if a trustee be robbed, the sum lost by the robbery shall be allowed him in account, although the amount be proved only *by his own oath*. To fortify this rule, he cites the case of Morly and Morly, 2 Ch. Cases, 2, in which the robbery was proved, and the sum, by *the defendant's own oath*. In Co. Lit. 89, it is said, that if a guardian receive rent, and be robbed, if without his negligence and default, he shall be discharged. In Southcote's case, in account, it was held to be a good plea before the auditors, that the defendant was robbed. In Jones v. Lewis, 2 Vez. 241, there is the same doctrine, as to robbery being a discharge of the executors, if properly proved. These cases establish the doctrine, that if an executor be robbed without his default, the robbery being proved, he shall, by his own oath, be permitted to ascertain the sum lost, and shall be discharged as to such sum. It is therefore only necessary to test the evidence in the present case by that rule. The authorities cited permit the defendant to adduce the evidence of the robbery, and by his own oath to ascertain the extent of the loss; but it is certainly not a necessary consequence of this rule, that, because a departing step has been taken from the strict line of evidence, by admitting the defendant's oath in his exoneration; therefore it is necessary to continue a progress in the same direction, by taking his declaration, unsanctioned by oath, as part of the evidence. The defendant in this case has stated the robbery positively. But he has connected with it the information, that he was absent from Long-Island during the whole of the war between the United States and Great-Britain, and thus conclusively evinced, that

the fact of the robbery was not asserted on his own knowledge of that circumstance, but collected from the information of others. That a robbery was committed, and some money stolen from the executor, seems to be pretty well established. The declarations of the executor, though contemporaneous, I think cannot be admitted as evidence; but if they could, those declarations are so inconsistent with each other, as, even admitting their validity, generally to establish the point, to fail of that effect here. All the witnesses, however, speak of *his* declarations only without any pretension to personal acquaintance with the circumstances of the robbery, excepting Abigail Rhodes, Mary Boss, and Robert Drummond, who were in the house of the executor on the night the robbery was committed; they also agree that the house was broken open by a party of men armed and disguised. Abigail Rhodes deposed, that 8 or £900 in cash was carried off, besides some articles of silver; that part of the money so carried off, "was money received of the estate of Robert Coe, deceased, and then in the hands of William Furman, senior, as executor of that estate." Upon her cross-examination she declares, "that some part of the money of which the said William Furman was robbed, belonged to himself, some to the brother of the said William, and that a considerable part belonged to the estate of Robert Coe, deceased; *that all the money of which the said William was robbed*, was kept in a strong chest, in an upper chamber, at the time of the said robbery; that the money was in gold and silver, and was contained in bags." She then proceeds to relate, that the executor was sent for to New-York, to attend the trial of some soldiers for the robbery; that a purse containing 60 guineas was shown to him, and he was required to identify it, which he could not. Mary Boss deposes, that the party robbed the executor *of all the money in the house*; that she was present and saw the robbers carry off the bags containing the money. Upon her cross-examination she says, that the money of which the executor was robbed, was *kept in a chest in an upper room*; that it consisted of hard money, and was contained in bags; that she saw the robbers bring the said bags down stairs, and carry them away; that she knew not the quantity of money, having never seen it counted; that she was at that time employed by Mrs. Furman to spin. Robert Drummond

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says, that the latter end of September, or beginning of October, 1779, when the robbery was committed, he lodged at the executor's; that he saw one of the robbers force open a chest, and take from it a bag; that another broke open a closet, and came out with three bags, which he supposed contained money, as it rattled; that the executor, after the robbers were gone, observed, that £300 of the money belonged to some orphan children, of the name of Coe; *that he had offered the money to the relations of those children, telling them it was troublesome times, and that he did not wish to run any risk in keeping the money.* Abigail Rhodes particularizes the several owners of the money, and mentions the executor, his brother, and the estate of Robert Coe, as composing those owners; all this money she says was put in *bags*, in a *strong chest*, in an upper chamber. Mary Boss says they took *all* the money *in the house*, which she also says was in a *chest in an upper room*, and that it consisted of hard money, *and was contained in bags.* If all this money described by these two witnesses was in bags and contained in a chest, Robert Drummond's testimony shows, that the whole of the money from this chest was not taken; for he expressly declares that *only one bag* was taken out of the chest, and three others from the closet; and as the chest contained money of three several persons, and probably in distinct parcels; from these depositions contrasted, it would appear, that though a bag of money was taken from the chest, it might not be the one containing the money of the complainants; these considerations, and the declaration of the executor deposed to by John Moore, that he had got it back again, and the one made by him, related by Sarah Leverick, *that some money had been left in every drawer*, superadded to which, the inconsistent declarations of the intestate at different times, show, that it is totally impracticable to identify the money of the complainants in the hands of the executor, as the money stolen; here the extraordinary interposition of the executor's oath might attach the loss to the fund in controversy; but without that, it is clear the discharge cannot be made out. I am therefore of opinion, that the defendant, who has admitted assets, is liable for the amount of the proportions of the complainants, and that it ought to be paid with interest, which is a very inadequate compensation for the privations which the complainants have

experienced by the non-application of the fund to their support and education. I take it therefore it must be referred to a master to settle the account, in doing which he ought to charge the defendant with the one-tenth part of the production of the real and personal estate of the testator; with these complainants $\frac{1}{2}$ of the shares of Elnathan and James, with the $\frac{1}{2}$ of Aletta's share, with interest on each sum from three months after the sale, deducting the money paid for her maintenance, with the share of the complainants in the personal estate of the testator, calculating the personal property at the selling, and not at the appraised value, and with the complainants' proportion of the two years rent of the testator's real estate with interest.

Riggs for the respondents. Before the counsel opens on behalf of the appellant, we shall state that it was agreed in the court below, that the suit should proceed, notwithstanding the death of one of the respondents. That circumstance, however, was available of, only by way of bill of revivor*, and cannot be urged now, because in appeal, nothing can be insisted on which was not offered below. 1 Har. Ch. 454. We shall contend also, that re-hearings are applications to the discretion of the court, similar to those for new trials; and that, as in the one case, a writ of error will not lie for a refusal, so an appeal cannot be maintained in the other, for dismissing. 3 P. Will. 8†. And further, that if the appellant was entitled to any re-investigation below, it ought to have been sought by bill of review, and not by a petition for a re-hearing. 1 Har. Ch. 450.

Bogert. On the first point made below, we have nothing to complain. The Chancellor's decision has put that at rest. But as to the interest with which we have been charged, we cannot be liable for it, unless it appear we have made the fund productive. It is in evidence it could not be put out, except with great difficulty; and allowing it could, it is settled an executor is not bound to do it. 2 Fonb. 184—5‡. Besides, the executors were ordered to retain in their hands; whilst doing this, the robbery takes place, and this is from principle, as well as necessity, a full exoneration. 2 Fonb. 177—8. 2 Vez. 240§. If the facts that a robbery was committed, and the money never recovered, were dubious, an issue ought to have been directed. To object, that the appellant's father did not prove the sum taken from him on oath, is

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* It has been said that no defendant, nor any who represents him, can revive before decree signed and enrolled. *Glenham v. Statville*, 2 Ch. Rep. 195. See *Mitt. Treat.* 26, 7, 8.
† *Mills v. Banka*.

‡ See the authority.

§ *Jones v. Lewis*.

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* Ivie v. Ivie.

† Palmer v.
Jones.

† Sammers v.
Rickman.

§ Vernon v.
Vaudry.

** S. C. cited
there, that a
trustee who is
guilty of a
breach of
trust, is liable
to his cestui
que trust.

†† Piety v.
Stace. A trustee using trust
money in the
funds, &c.
shall be charg-
able with in-
terest. The
demand, how-
ever, of the
cestui que
trust, is only
a simple con-
tract debt, un-
less acknow-
ledged by the
trustee under
hand and seal.
Gifford v.
Manley, For-
rest. 109.

†† 1 Lex. Mer.
Amer. 392.

but of little force; for as at that time, and till his death, no courts were sitting, it was impossible to swear to that circumstance in any legal and efficacious manner. The appellant himself could not do it, but in the manner in which he has done; according to the best information and belief. It is only in case of gross neglect, an executor standing in the relation of trustee, is ever made liable in chancery. 1 Atk. 430 *. The proof against him must be very strong. 1 Vern. 144 †. And that for fear of discouraging people from undertaking burthen-
some trusts. 2 Ves. J. 37 †.

Riggs and Hoffman contra. In support of the decree, we shall contend, that previous to the robbery, the executor was guilty of a most palpable breach of his trust, and so converted the fund; any subsequent loss, therefore, was of his own property, for which we are not to suffer. Barnard, 303 §. 2 Fonb. 169, n. (b **.) 4 Ves. J. 620 ††. The very sale was in violation of his duty. It was at a time when property was low; and when even the product could not, as is stated by the answer of the appellant himself, be put out to interest; this too contrary to urgent remonstrances. In addition to these observations, the refusal to apply the portions of the respondents in bringing them up according to the directions of the will, was clearly a breach of trust, and a conversion of the fund pro tanto. This, upon the principle before laid down, renders the trustee answerable for the whole; and for this we have an authority in the case of *Le Guen v. Gouverneur & Kemble* †† in this very court. As to the residue of the decree, we repose ourselves on the doctrines and reasons it contains §§.

Troup and Benson in reply. If the court does not reverse in toto, they will at least order an issue to be directed. On the fact of robbery, there is no doubt. The only question is, as to the recovery of the money. If the proof of that is deficient, a jury is the proper tribunal, unless the court think it established that it was never regained. As to the case of *Le Guen v. Gouverneur & Kemble*, that turned on this point. The defendants refused to give the plaintiff an authority to re-

§§ Both the counsel went into very elaborate and lengthy examinations of the testimony in the cause, but as the decision in the court below, and the opinions in this, contain the essence of the whole, to insert the ingenious arguments delivered, would not elucidate the point, how much soever they might evince the talents of the speakers.

receive his money, to which he was entitled, and which he did not claim, but subject to their lien, after deducting fully its amount. The cases are by no means parallel. By the decision of the Chancellor, interest is ordered, though the robbery is allowed. This is acknowledging the misfortune, yet inflicting a punishment; for interest is given against a trustee by way of mulct or penalty. In this respect, therefore, the decree is clearly wrong. So, in allowing the rents of the real estate for two years to be taken into the computation. Till the estate was sold, the rents * belonged to the heir at law; for to him the estate descended till the time of sale.

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Spencer, J. It is proper that I first consider, whether the proceedings on the petitions presented by the appellant for a re-hearing of the cause, after a decree settling all the principles, and the dismissing those petitions, is warranted by the course of proceedings in the court of chancery. It appears to me, that the Chancellor disposed of those petitions correctly; for, as has been insisted on by the respondents' counsel, instead of asking a re-hearing, on the discovery of new evidence, the application ought to have been for a bill of review, upon which the competency of the two witnesses, Hezekiah Field and Susannah Coe, would have been directly in issue. It was, however, not necessary to have filed articles; and in *Callaghan v. Rochfort*, 3 Atk. 643, Ld. Hardwicke decided, that articles were improper, when the objection was to the competency of the witnesses; but when to their credit, they were proper. The question, as to the interest of money upon Long-Island during the war, was certainly a question to which the appellants examined witnesses; and it cannot, with any propriety, be pretended, that he discovered testimony as to the rate of interest, of which he had no knowledge before the passing of publication, or the decree. But, upon any grounds which may be assumed, as the application to the Chancellor was for a re-hearing, in my opinion, the appellants' counsel mistook their remedy, and the Chancellor very properly dismissed the petitions. In making up my opinion, therefore, I have rejected all the exceptions to the testimony of the two witnesses, Hezekiah Field and Susannah Coe. The first question presenting itself, is, whether there is testimony enough to warrant the court in saying, there was a robbery? And, upon this head of the inquiry, without at all re-

* The rule is, that where the real estate is to be sold at all events, and turned into personalty, the rents go as the land would. See *Cruse v. Barley*, 3 P. W. 20, and the note of Mr. Cox. But if the product of the land be to be divided between certain legatees, some of whom die during the life of the testator, a resulting trust will arise, as to their shares, in favour of the heir at law.

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garding what Wm. Furman said, there cannot remain a doubt. It is proved by the depositions of three witnesses, who were present at the time the robbery was perpetrated. Abigail Rhodes, Mary Boss, and Robert Drummond, depose to the facts. They relate the circumstances, and agree in the principal occurrences more correctly than is common for three persons, who are deposing to an incident twenty-three years after it has happened. There can exist no reasonable ground on which to doubt the robbery. The Chancellor was impressed with its having taken place; and in truth, the respondents' counsel admitted it. The next important points of inquiry are, 1st, Whether the money which had been paid by Mr. Titus to the executor of Robert Coe, Wm. Furman, and which appertained to the respondents, was part of the money whereof Mr. Furman was robbed? and, 2d, Whether this money was ever recovered by Furman? The law on the subject of bailments, and with respect to the responsibility of factors and trustees, is as firmly settled as on any other subject which can be presented. If the nature of the bailment or trust be such, that the bailee or trustee is to have no reward for his services, the law will not require of him any greater diligence than he usually exercises with regard to his own property; and it seems well established, "that if a trustee be robbed of the money he received, he shall be allowed it on account, the robbery being proved, although the sum is only proved by his own oath; for he was to keep it as his own; so in case of a factor, for he cannot possibly have other proof." And it was correctly said on the argument, by one of the appellants' counsel, that it would be bringing an executor, in whom the testator reposes such especial confidence, to a test too severe, when he has proved a robbery, to require of him an identification of the money belonging to the cestui que trust. Such severity would well nigh deter any man from assuming a station of such responsibility, upon the calls of friendship, and without any possible advantage to himself. It is objected, that William Furman, the executor of Robert Coe, never made oath, either as to the robbery, or to the identity of the money belonging to the respondents. It has been answered, and I think satisfactorily, that there is no mode pointed out for a trustee, under his situation, to have pursued. Had he made an affidavit, it would have been extra-judicial,

§ Fonb. 181.

and of no more importance than his own declarations. He could not resort to a court of chancery; because, from the time of the robbery, until very near the time of his death, which was in 1783, that court was shut. What means could he have pursued under the then state of things, which he did not? I confess myself at a loss to perceive any neglect on the part of William Furman, in that respect. If, then, William Furman could not avail himself of an opportunity to make the oath, which most certainly will, in cases of this kind, protect a person, as to the amount of the sum robbed, what shall we require of him that he did not do? It appears from the deposition of Robert Drummond, that immediately after the robbers had retired, William Furman went with him up stairs, where it is agreed, by all the witnesses, the money was deposited; and that he then stated to Drummond the amount to be £900; that £300 belonged to some orphan children, of the name of Coe; and that he was an executor for the children. Abigail Rhodes, who, from her situation and relationship to William Furman, being his daughter, may be presumed to know, states in positive terms, "*that a part of the money of which the said William Furman was robbed, as aforesaid, was money received of the estate of Robert Coe, deceased, and then in the hands of the said William Furman, senr. as executor of that estate.*" Mary Boss, who is spoken of as Polly Thompson, also resided in the family of William Furman. She states, that he was robbed of all the money he had in the house; and that the next morning she heard him say, that all the money belonging to the grand-children of Robert Coe was taken by the said robbers, together with his own. Mrs. Rhodes could only speak of the money belonging to the respondent; because, on the third of August before the robbery, the other legatees had been paid their proportions of the proceeds of the real and personal estate. It appears to me, that, from these facts, taken collectively (and I know of nothing to detract from them) it must be manifest, that the money belonging to the respondents, and in the hands of William Furman, was taken by the robbers, together with his own. Did William Furman recover this money? The only witness who establishes this fact is *John Moore*. His character appears to be fair; to his declaration, therefore, great weight is to be attached. He says, "that he heard

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"William Furman say, he had been robbed of a certain sum of money, but that the robbery had been detected, and the money recovered; and that he had got the same again." To believe this to be correct, is also to believe William Furman to have been a most profligate and abandoned character. That he was otherwise, appears from the confidence reposed in him by Robert Coe, and the proof that he was a man of good character. It is to be again remembered, that John Moore is speaking to a conversation more than twenty years past; and it would be going too far, to believe that he did not labour under some mistake, when the testimony opposing this fact shall have been considered and weighed. If William Furman made the declaration imputed to him by John Moore, there can be no satisfactory reason assigned, why it should have been confined to Moore alone; and most certainly his own family would have been informed of such singular good fortune. Robert Drummond states, that he was sent for to appear as a witness before the court-martial, on the apprehending some men charged with the robbery. He did appear, but could not identify the robbers, in consequence of which they were remanded; but he never heard or understood, that the money, or any part of it, had been restored. This witness had the best means of knowing the fact of the recovery of the money, had it happened. This testimony, though negative, in my opinion affords a strong presumption that it never was reclaimed. Abigail Rhodes and Mary Boss both unite in declaring, that they never heard that any part of the money taken by the robbers had been recovered; and it is inconceivable, if the fact had been otherwise, that they should not have heard of it from Mr. Furman. John Gosper asserts, that he heard Mary Boss some years afterwards say, "that William Furman had been very lucky, for that he had recovered all the money he had been robbed of, except a small part." This declaration she denies ever having made; and, admitting that it detracts from her credibility, for having asserted facts not under oath, which she denies when under oath, still the testimony of Drummond and Mrs. Rhodes remains unimpeached. *Howard Furman*, who appears to have lived in the neighbourhood, heard of the robbery the day after it was committed, but never heard that the money was recovered. Benjamin Coe was told of the robbery

in 1783, by William Furman; and that he had been to New-York, on the apprehending some soldiers suspected, but he told him he could get no account of the matter. Joseph Robinson was told in 1783, by William Furman, of the robbery; and that it amounted to £900, of which 5 or £600 belonged to him. He says nothing of its having been recovered. *Thomas Burroughs* says, he was informed by William Furman of the robbery; and that he had been sent for to New-York to fetch the money; but he did not fetch it, as the person having the charge of it had gone to Kingsbridge. *Susannah Coe* says, she has heard William Furman say he was robbed of a purse of money; that he had seen the purse and the money again in New-York; and that the person in whose charge it was had gone to Kingsbridge. It is manifest, that the last witness, to say the least of her, must have been mistaken; for, from the testimony of Drummond and the other witnesses, the money was in bags; and it is somewhat remarkable, that Mr. Furman could have seen the purse and money, when the person in whose charge it was, was absent at Kingsbridge. The testimony of Joseph Burroughs presents nothing but the vaguest hearsay, and deserves no consideration. Upon the whole, from the strictest examination of the evidence in my power, it appears to me, that the weight of evidence is decidedly in favour of the appellant; that the money was not recovered: therefore I am for reversing the decree, and dismissing the bill of the respondents with costs in that court. I have not noticed the pretended breach of trust, on the part of William Furman, in disposing of the real estate of Robert Coe at private, rather than public, sale. The testimony in the cause abundantly shows, that his conduct was fair and honest. If he really misjudged, in either the time or mode of selling, it will not warrant me in saying, contrary to the proof, that he was guilty of a breach of the trust reposed in him. There are other minor points in the cause, the decision of which is rendered unnecessary, by the opinion I have given. There is one thing yet to be noticed: it is alleged by *Susannah Coe*, that she applied to William Furman for money to purchase necessities for the children, and that he refused, saying, "that no person should have money, on account of those legacies, until the children were of age." This, it has been contended, was a conversation of the whole; or, in other words, that he became answer-

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able for the whole amount in his hands, if it was afterwards robbed, and never recovered. The testimony of Mrs. Coe, on this point, is very loose and inconclusive. She furnishes no dates; and it is impossible to say, whether her application was before or after the robbery. But to this there is a further answer, that Mrs. Coe had no right to make the demand, unless she was guardian to the children, which she appears not to have been. Mr. Furman's refusal to an unauthorized person cannot, therefore, in law, draw after it the consequences which have been contended for.

Livingston, J. The questions in this cause are principally questions of fact. They involve the robbery of the intestate, and the subsequent recovery of the money. That William Furman was robbed, can admit of no doubt; the testimony to this point is full and conclusive. His Honour the Chancellor regarded it in that light; nor can any who will read the depositions entertain a different opinion. The want of Furman's own oath (which indeed could not have been taken, except in an extra-judicial way) is abundantly supplied by other proof. There is as little difficulty in determining that the money of the complainants was taken, as well as his own. Some of the witnesses, who establish the robbery, expressly state that part of the money of which he was robbed belonged to the estate of Robert Coe, deceased. Considering the manner of the robbery, which was perpetrated in the night, by several armed men, who must of course have had a complete control over the dwelling-house and all its inhabitants, it is not probable they left any money, worth speaking of, behind. Whether the money was regained, is a question of more difficulty; and yet on the proof before us, my opinion would be in the negative. There is no one witness, except John Moore, who deposes affirmatively on this point; and although a man of character, it is probable either that he has committed some mistake, which would not be extraordinary, after so great a lapse of time, or that some circumstance is omitted, as to time and place, which would give a very different complexion to his testimony. Perhaps the declaration of Furman, which he speaks of, was made after he had heard of the detection of the robbers, and when he of course expected to recover the money. Some explanation is wanted from this witness to reconcile his testimony with the declaration of the other witnesses, and the conduct of Furman to other persons. How

happens it, that none of the persons who resided in his family ever heard this money was recovered, or that Furman, who bore the character of an honest man, never mentioned so important a circumstance to any but Mr. Moore? or that the recovery of this money did not become a matter of as great, or indeed greater, notoriety in the neighbourhood, than the robbery? The money could not have been returned in secret. It would have been known to many; it would have been the subject of conversation throughout the neighbourhood; it would not have been in the power of an artful man to have suppressed a knowledge of such an incident. An honest man, as Furman was, would have had no motive to attempt it. But notwithstanding the strong inclination of my opinion in favour of the appellant on this point, it is one of those cases which ought to be submitted to a jury. A more full and satisfactory examination can thus take place, and there will be less danger of error in that way, than if we take the decision of it upon ourselves. My opinion therefore is, that his Honour the Chancellor be ordered to direct a feigned issue to be tried between the parties at common law, to determine whether any and what part of the monies of which William Furman, as executor to the last will and testament of Robert Coe, deceased, was robbed, during the late war between the United States and Great-Britain, was at any time and when recovered by him; and that all further directions be reserved, until the trial of such issue. Some complaint was made against the sale of the real estate. This complaint was without cause. The Chancellor considered it so; and I entirely concur in this part of his opinion. The sale was fair, well intended, for a full value, and I think well-timed. Although money produced little or no interest on Long-Island, during the war, the farm would not have yielded any great rent, and might, and probably would, have suffered much. It was also said that William Furman, by refusing to advance any money to Susannah Coe, for the complainants' support, was guilty of a breach of trust, and on the principle established in the case of *Le Guen and Gouverneur & Kemble*, he became liable, from that moment, for the whole fund in his hands, and that therefore no subsequent robbery could shield him from a responsibility to that extent. I cannot perceive how the case cited bears on the one under review. In *Le Guen v. Gouver-*

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neur and Kemble, nothing more was decided, according to my understanding of it, than that factors, who were in advance, and under heavy responsibilities for their principal, had no lien on his securities in their hands, and that in a special action on the case against them for misconduct, it was not only unnecessary in the plaintiff to prove a special damage, but incompetent for the defendant to show their principal had been benefited by this alleged misconduct. If Furman was guilty of a breach of trust, it could only be for so much as was necessary for the support of these children; but that could not affect the surplus, which must have remained in his hands after advancing what Susannah Coe asked of him. It is however sufficient to say; that Mrs. Coe had no right to make this demand, and that it does not appear with sufficient certainty that it was made.

In this last opinion Kent, Justice, concurred, contra Lewis, C. J. who, with the majority of the court, being for a reversal, the decree was accordingly reversed in toto.

James Grant and others, *Appellants*,
And the President, Directors, and }
Company of the Bank of the Uni- } *Respondents*.
ted States,

James Grant, *Appellant*,
And James Bissett, Nathaniel Lawrence, Thomas Morton, the President, Directors, and Company of the Bank of the United States, Richardson Underhill, and Henry Remsen, } *Respondents*.

Registered mortgages must be paid off according to the dates of their registry. The doctrine of tacking does not apply between registered mortgages.

JAMES BISSETT, being seised in fee, of 4 lots in the city of New-York, on the 10th of May, 1800, mortgaged to Peter Onderdonk in fee, three of them, for \$1125. On the 10th of the same month, this mortgage was duly registered, and shortly after fairly assigned to the President, Directors, and Company of the Bank of the United States, for a full consideration. On the 12th of June, 1800, Bissett mortgaged all

the four lots to John Taylor, in consideration of \$2500. This consideration was made up in the following manner: \$506 cash paid to Bissett; \$857 agreed to be laid out on the premises, and \$1147, in debts due to Taylor and others, assumed by him on account of the mortgagor. On the 27th of the same month of June, Taylor assigned the bond and mortgage to Alexander M'Gregor, who refunded to Taylor \$476 he had paid to Bissett, and entered into the responsibilities Taylor had assumed, for the performance of which, M'Gregor offered to give Bissett his bond. On the day following, the 28th, this mortgage also was duly registered. On the 2d of July following, Bissett mortgaged to the President, Directors, and Company of the Bank of the United States, for \$1950, the three lots before mortgaged to Onderdonk, and they, on the same day caused their mortgage to be duly registered. On the third of June, 1801, M'Gregor assigned to James Grant, the Appellant, the mortgage to Taylor. After these transactions, Bissett becoming a bankrupt, the Bank filed a bill in chancery against him, his assignees, Taylor, M'Gregor, the appellant, and several others of the mortgage and judgment creditors of Bissett, praying that they might be ordered to come in and redeem both the mortgage to Onderdonk, and that to the Bank, or that the premises might be sold to discharge what was due upon them. To this bill Grant appeared and answered, insisting that as the bonâ fide holder, by assignment of the mortgage second in date and time of registering, he had a right to be paid out of the mortgaged premises next after the mortgage to Onderdonk. Grant, as assignee of the mortgage to Taylor, filed also his bill against Bissett, his assignees, the President, Directors, and Company of the Bank of the United States, and other mortgage creditors of Bissett, praying that the lot of ground mortgaged to Taylor, and not included in the mortgage to Onderdonk, might be sold, and the proceeds applied exclusively to the discharge of Taylor's mortgage; and as to the other three lots, that they might be sold, and the money arising thereby, be appropriated in the first place to the payment of the mortgage to Onderdonk, and after satisfying the same, that the surplus should go to make up the deficiency, if any, which might arise in satisfying the mortgage to Taylor, by the sale of the fourth lot. To this latter bill all the defendants, ex-

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cept the President, Directors, and Company of the Bank of the United States, appeared, answered severally, and virtually disclaimed or submitted to the judgment of the court. The Bank, however, answering under their common seal, alleged, that when they took their mortgage on the 2d of July, 1800, they had no notice of that to Taylor, and that holding the first mortgage in fee to Onderdonk, they had a right to insist on being first paid the amount of both securities. They also alleged fraud in Taylor, in procuring his mortgage from Bissett. Both causes being at issue, came on by consent together. In that by the Bank of the United States, the complainants did not examine any witnesses. In that by Grant, he examined two witnesses, who were cross-examined by the Bank, one of whom proved personal notice of the mortgage to Taylor, to one of the Directors before the mortgage to the Bank, and both proved the mortgage held by Grant to have been given for a full consideration. The only evidence to impeach this, was derived from an answer of one of the persons made a co-defendant with Grant, against the reading of which he strenuously objected. It was, however, decreed, that the Bank should be first paid out of the proceeds of the sales of the three lots, the amount due on both the mortgages held by them, before any part thereof should be applied to the satisfaction of the mortgage held by Grant, which it was decreed should not be deemed a valid security for the amount mentioned therein; but that it should be referred to a master, to inquire what part thereof had been actually advanced to, or for the use of Bissett, either by Taylor or M'Gregor, and that so much only, as the master should find and report thus due, should be allowed and paid to Grant, in satisfaction of his mortgage, out of the proceeds of any of the mortgaged premises. These decrees being appealed from, his Honour the Chancellor now assigned his reasons.

Mr. President—On this case, it will be necessary to determine, 1. In what order the mortgages in question are to be satisfied? 2dly. What ought to be the amount of satisfaction, as to the one executed to Taylor? As connected with the first question, *the right of tacking* has been denied; but our registering act, it appears to me, is not dissimilar in its provisions, and certainly similar in its object, to those referred to in the authorities cited. Both the British and our

fact are calculated to afford a test, to determine the priority of satisfaction, as relating to mortgages on the same subject, leaving all other legal and equitable consequences to attach, as if the registry had not existed. I take it, therefore, the doctrine of tacking has not been altered by our statute, requiring the registry of mortgages. The complainants, in their answer to the bill of the defendant, Grant, expressly deny their knowledge of the existence of the mortgage to Taylor, and his deposition discloses no facts which can affect them, with notice prior to the execution of the mortgage to them; for, though he deposes that he gave the information of the circumstances attending the taking of his mortgage to Robert Lenox, one of the directors, he does not ascertain the time otherwise than by declaring, that "*he thinks it was before the said President and Directors had taken their mortgage.*" This is too vague and indeterminate, and hence it is not necessary to give an opinion on the question, whether the notice, if fully proved, was well-given to a Director? If the complainants had no notice of the existence of Taylor's mortgage, they are completely within the rules adopted by this court, on the subject *of tacking*; but it can apply only to the lots mortgaged to them, and the fourth lot must be exclusively appropriated to satisfy the mortgage to Taylor; but it appears that \$857 79 cts. of the sum, for which it purports to have been given, were to be applied to the improvement of the mortgaged premises, and there is no evidence that it has been so applied: and it appears from the answers and depositions of the defendants, that this point, though that was not necessary, as they took their assignments subject to all equities, has been invariably attended to, in the several transmutations of the mortgage. Hence, there is not the least ground for permitting it to be retained by Grant, the assignee. It must, therefore, be referred to a master, to ascertain the amount due on the two mortgages to the complainants and Onderdonk, and the sum due on the mortgage executed to Taylor; but in making the statement on the latter, the sum of \$857 79 cts. with the interest accrued thereon, must be deducted, unless it shall appear to the master, that any part of that sum has been actually applied to finishing the houses erected on the mortgaged premises, in which case proper allowances must be made for the expenditure. The question of costs, and all other di-

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reactions, to be reserved, until the coming in of the master's report.

Riggs for the appellant. We come before this court, insisting on the right of James Grant, as holder of a second mortgage, duly registered, to be satisfied in preference to a third mortgage, given and registered subsequent to the second, though such third mortgage is held by the same person who has a first mortgage, registered previous to our second. Against this right, the English doctrine of tacking is relied on. But with them there is no general register act, as with us. Their statutes on this subject are partial laws; and among the variety of decisions reported upon them, there is not one where the contest has been between two registered mortgages. It may not, however, be useless to examine how far, on the principles of the British adjudications, their rules will apply to, and support the present decree. It is a maxim with them, that, if a first mortgage be purchased in, to aid a junior incumbrance, such first mortgage must be forfeited. 1 Pow. on Mort. 531. In the present case, the mortgage money was not payable before the end of the year, and the assignment to the Bank was within four months. On this ground, therefore, the law is against the Bank. There is also another. To enable a puisne mortgagee to tack, he must have lent his money without notice of the mesne incumbrances. 1 Pow. on Mort. 537. 3 Atk. 238 *. 2 Vern. 271 †. 2 Fonb. 301. n. (b.) The evidence of notice to the bank is complete. Their denial not being upon oath, but under seal, cannot weigh against the testimony of Taylor, and is in itself an absolute nullity.

* Mead v.
Ld. Orrery.
† Saunders v.
Dehew.

‡ In Collet v.
De Golls and
Ward, For-
rest. 65, it was
ruled that the
publication in
the Gazette of
the issuing a
commission of
bankrupt, is
notice to all
the world, be-
cause such as
is prescribed
by an act of
parliament, in
which the as-
sent of all is
implied.

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For as a body corporate, having neither soul nor conscience, they cannot be sworn, and are not liable to be punished for perjury. Against them, therefore, and their denial, the evidence of one witness is sufficient, though, unaccompanied by circumstances, it might not avail against a natural person. Though the notice was not to the president, yet, being to a director, it is good presumptive notice; and by such, a party is as much affected, as by actual intimation. 2 Fonb. 146 to 155. Besides, as our act is general ‡, the registering alone ought to be considered as notice. It is enough to set a person on inquiry, and that has always been held sufficient to affect with notice. 1 D. & E. 755 §. With us, registering is

like docketing of judgments, and that is invariably deemed to

make a purchaser take subject to the charge. Mr. Powell, in his treatise *, does, we admit, state as his opinion, that the doctrine of tacking would be allowed between registered mortgages. It is, however, but his opinion, and that upon the operation of the 2 and 3 Anne, ch. 4, and the 7 Anne, ch. 20. But those statutes have not such words as our act. Our law says †, "In case of several mortgages of the same premises, or any part thereof, the mortgage or mortgages which shall be first registered, shall have preference in all courts of law and equity, according to the times of the registry of such mortgages respectively." If the decree complained of is permitted to stand, this part of the act is repealed. As to the sums actually advanced by Taylor, M^cGregor, and Grant, if any investigation of them was to take place, it ought to have been by examination of witnesses, and not before the master; besides, it is sworn that they were to the full value, and against this the answer of a co-defendant could not be read; for there is no rule better established, than that the answer of one defendant shall not be read against another ‡. 2 Ves. J. 11 §. 2 Atk. 303 ||. Ibid. 39 **.

Van Vechten for the respondents. It is a settled principle, that where equitable and legal titles unite, they shall overbalance those which are merely equitable. For the equities being equal, neither the one nor the other has, on the score of conscience, any claim to a preference over the other; there can then exist no kind of reason, for disturbing or taking away the legal rights and estate of the other. The courts have, therefore, always left the party having both the legal and equitable estate, in full possession of his rights. 2 Pow. on Mort. 636 to 644. Wherever legal and equitable estates meet, the union is held to destroy all mesne equities. Stra. 240 ††. From these positions, has been derived the doctrine of tacking. The act does not vary the law on this point. It orders, that they shall be paid according to the dates of their registering, that is, where there is only a set of successive incumbrances regularly appearing. But it does not prevent attaching to the first registered mortgage subsequent rights, which enable the puisne mortgagee to protect his estate, by that which he acquires. For as the act is meant to operate only between registered and unregistered mortgages, when all are registered, they stand as if the act had never passed. The puisne mort-

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† 1 Rev. Laws,
481. sec. 2.

‡ Where the defendant professes not to recollect, but states that another defendant knows the fact, the answer of the defendant thus referred to, may be read against him. 1 P. W. 300. § Jones v. Turberville.

|| Lockwood v. Ewer.

** Hill v.

Adams.
†† Hagshaw v. Yates.

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gaggee has, by his diligence, acquired a preference. If the registering is to be notice, then the second mortgagee has been guilty of a laches, in not purchasing in the first mortgage, to protect himself. Not having done so, we had a right to do it, and to cover our equitable, by Onderdonk's legal estate. The difference between the effect of general and particular statutes, is imaginary. The only actual one is, that under one, you must search in all cases; under the other, only in those arising within a specific county. The principles to regulate in each are the same, for the law is in both the same, though the limits within which it is to be applied are different. The notice relied on, was not given to the proper person; it ought to have been to the head of the corporation, the president. It is not, however, sufficiently alleged; it is merely "as he thinks." It ought to have been strongly evidenced, and such as to almost impute a fraud. 2 Pow. on Mort. 639. Jolland v. Stainbridge, 3 Ves. J. 478. But, allowing all the force asserted to the provisions of our act, still it can never be contended, that they were meant, by merely registering, to protect fraud. It is in evidence, from the confessions of one of the defendants, that the full value for which the mortgage was given, has not been paid; and as Grant, in his answer, states his title to have been derived from Taylor, he refers to what Taylor says respecting that title, and makes his answer evidence for the reasons in the anonymous case, in 1 P. Will 300*, and Wyat's Prac. Reg. 75.

* See ante
page 117, note
there †.

Hamilton in reply. Allowing the doctrines of the other side to be correct, as to the reasons on which tacking has been introduced, and that the registering a mortgage is notice to the second mortgagee, it must equally be so to the third, and then a third mortgagee can never stand on equal equity with a second. This, therefore, subverts all the argument, as to the equal equity on which tacking is said partly to rest. But the decisions in England can never, on this subject, be applicable to cases here. The words of our law, take them out of the operation of the English precedents. They proceed on the settled maxims of their courts. They are not directed or controlled by the statute law; for the 2, and 3, and the 7th, of Anne, do not propose the regulation of registered securities. The act of our legislature was framed for the purpose of settling their priorities. Its object was to secure lenders of money.

This cannot be effected, if the construction on the other side prevail. A second mortgagee, after due search, may repose on the estate being adequate to the payment of his demand, and that of his senior incumbrancer; the very next day a cunning or colluding third person lends a further sum, takes in the first mortgage, and cuts out the second. The principle of tacking, encourages fraud; it supersedes that necessity of searching public offices, which ought always to be induced, when title deeds are not shown to the lender. This not being done, ought to lead to inquiry, the neglect of which is what the Lord Chancellor, in 1 Eq. Ca. 331, calls filthy negligence*. The express words of our law, are our reliance. They destroy all that system of artificial reasoning, as to taking in the legal estate, to protect the equitable; for, by the act, a priority at law is given to a second registered mortgage over a third; nay, it gives also in terminis the superior equity, and this on equitable principles; for, where there is a law ordaining a registry to be made of mortgages, search and inquiry at the office is at least an equitable duty. As to the denial of notice by the bank, under their seal, it is enough to say, the only reason why an answer is evidence, is from being under oath. Whatever is not so, cannot be testimony, except as to records, and cases of confession. That there was not an original full valuable consideration from Taylor, allowing it to be so, is nothing to Grant; for a transferable security, though, in its origin made on a less consideration than it purports, becomes, in the hands of a bonâ fide assignee, operative to its full amount. Even fraud, except where positive law creates the security, is, by a fair assignment, for full and valuable consideration, purged, so far as it respects the assignee. The inquiry, therefore, into the sums advanced by Taylor and M'Gregor, is not to be supported. The nature of the considerations cannot be questioned. Money paid, money to be laid out, and assumptions of debts—both law and equity must, and do, allow their validity. On every ground, therefore, we contend the decree must be reversed.

Spencer, J. The Chancellor has adopted the rule of the court of chancery in England, which is, that where parties have equal equity, and one of them has a legal advantage, not to deprive the one, of the legal preference he has obtained. That this rule is established there, I fully agree; and, unless our statute has created a rule on this subject peculiar to our

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own jurisprudence, I shall acquiesce in this part of the decision. For, I do not think that the registering the mortgage is upon legal principles notice of its existence; though, was the point now for the first time to be decided, I should concur that it ought so to be considered; the contrary, however, is too well established to be drawn in question. Nor do I consider the notice given by Mr. Taylor to Robert Lenox, either actual or constructive notice. It is left quite uncertain at what period this notice was in fact given; and, if given in time, it does not appear that Mr. Lenox was present, when Bissett became indebted to the Bank, or gave the mortgage, or that Mr. Lenox ever communicated it to the board. They deny such notice by their answer; and, although it is not, nor could it be under oath, yet it is certainly sufficient to repel the vague testimony of Mr. Taylor. This brings me to the consideration of our statute concerning mortgages. It provides, that, "in case of several mortgages of the same premises, or any part thereof, the mortgage or mortgages, which shall be first registered, shall have preference in all courts of law and equity, according to the times of the registry of such mortgages respectively." It appears to me, that the statute has abolished, with respect to registered mortgages, the right of tacking a junior to a senior mortgage, and thus excluding an intervening one. They are to have preference in all courts of law and equity, according to the times of their respective registry. To allow a junior mortgage to be paid first, is denying to an elder mortgage the preference the statute has given. The statutes of 2d and 3d Anne, ch. 4th and 7th, Anne, ch. 20th, though affording a preference to registered over unregistered mortgages, do not determine, as our statute does, the preference they are to have, or in what order registered mortgages are to be redeemed or satisfied. Though it was truly observed by the appellants' counsel, that there are no decisions in England to be met with, denying the principle now advanced. I am therefore of opinion, that in this respect, the decree of his Honour the Chancellor ought to be reversed. The remaining question is, whether the mortgage held by Grant is to be considered a valid security, for the amount therein mentioned, and thereby secured? It will be proper, first, to consider, what is, and what is not evidence in the cause. In the bill filed by the Bank, against Grant and

others, John Taylor and Alexander M'Gregor are made co-defendants; and the respondents counsel, considering some parts of their answers as operating in their favour, have dwelt upon the facts disclosed by them. I have no hesitation in saying, that the answer of one co-defendant is evidence neither for, nor against the other. The authorities cited maintain this position. It appears from exhibits and testimony, that the consideration of the mortgage given by Bissett to Taylor, was money advanced by Taylor to Bissett, money owing by Bissett, and assumed to be paid by Taylor, and a balance of between 8 and \$900, to be paid in finishing certain houses on lots included in the mortgage. It appears that Taylor, about the 20th of June, assumed debts, and became responsible to Bissett's creditors, to the amount of about \$1000, besides the sum advanced. It further appears, that Alexander M'Gregor, to whom the mortgage was assigned by Taylor, as a consideration for that assignment, refunded money to Taylor, which he advanced to Bissett, and also, for the purpose of securing a small demand he had against Bissett in his own right, and another, as administrator of one Cunningham, and also, in consideration of his becoming responsible to sundry persons, for claims which they had against Bissett. For the performance of the agreement thus made by M'Gregor, he executed his bond to Taylor, and he offered to Bissett to guarantee its fulfilment. Though the business was transacted loosely between Bissett and Taylor, it appears to me, there exists no pretence of fraud; and as to the validity of such consideration, I have as little doubt. Under these circumstances, the mortgage originally given to Taylor, was assigned to Grant. There is nothing tending to show that Grant did not advance the full amount of the consideration, if the answer of M'Gregor be not evidence, and that it is not, I have before said. I am of opinion, that the decree be reversed. That after applying the proceeds of the one lot, included in the mortgage to Taylor, and not in the others, towards the satisfaction of the mortgage held by Grant, the proceeds of the sale of the three lots, after satisfying the principal and interest due on the mortgage to Onderdonk, and held by the Bank, be applied to the satisfaction of the principal and interest of the mortgage held by Grant, considering the same as a valid security for the entire sum mentioned therein, and secured thereby.

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and oth.
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U. S. Bank.
James Grant
v.

James Bissett
and oth.

1 P. W. 300.

2 Atk. 303.

Ibid. 39.

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1804.
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Groot.

The other judges and residue of the court concurring, the decree was unanimously reversed. Lewis, C. J. however, observed, that he thought the mere registering a mortgage was notice to subsequent incumbrances.

Marshall and William Jenkins, *Appellants*,
And Catherine De Groot, adminis- } *Respondent*.
tratrix of Peter De Groot,

If one of three jointmakers of a promissory note die solvent, and the two survivors be insolvent, equity will direct payment out of the assets of the deceased.

THIS was an appeal from Chancery, in which the facts appeared to be these: James Goslin, jun. John Goslin, and Peter De Groot, made their joint promissory note for £133 1s. 2d. payable to the appellants four months after date. Peter De Groot died intestate. The appellants prosecuted the surviving makers of the note to judgment, issued into the county where they resided a *fi. fa.* which was returned *nulla bona*, and they have since become insolvent; but the respondent has sufficient assets from the intestate to satisfy the debt. The bill prayed that the respondent might be compelled to pay the demand, but on a general demurrer the Chancellor was pleased to dismiss the bill with costs, and thus assigned his reasons:

Mr. President—From the authorities cited on the argument, it abundantly appears, that courts of equity are not favourable to the common law doctrine of survivorship in cases of this kind, and that they have shown a disposition to avail themselves of circumstances to avoid its effects. Thus the words of a condition of a joint bond have been resorted to, for the purpose of eluding the operation of this strict rule of law. The application of the money borrowed to the concerns of a joint trade, and the obligor's drawing the bond himself *jointly*, have been admitted as circumstances to relax the operation of that rule; but none of the cases go the length of deciding that, *divested of circumstances*, the obligation of a joint contract is to attach, as well to the representatives of the dead, as to the survivor of the contracting parties. This case presents the naked facts of a *joint debt* and survivorship; and, I think, must be determined on the rule which obtains at law, and if so, the bill cannot be sustained. In giving this opinion, I regret that the rule is so well established, as to

oblige me to conform to it. The inclination of my mind was to afford relief, if I could discover any principles which would bear me out in it; but, thinking as I do, respecting the legal principles governing this case, I dismissed the bill with costs.

*** The respondent not appearing to argue the cause, it was heard ex-parte.

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Per curiam delivered by Thompson, J. The facts stated in the bill, are admitted by the demurrer to be true. The only question, therefore, presented to the court, is, whether, where three persons make a promissory note, one dies intestate, but solvent, and the two survivors become insolvent, the estate of the deceased can in equity be charged with the payment of the note? I have not been able to discover any principles of justice on which it can be exonerated. It is a rule applicable to proceedings in courts of law, that where two are jointly bound, and one dies, the survivor must be prosecuted, and an action cannot be maintained against the representatives of the deceased. This, however, is a rule controlling the remedy, and not determining the right. Courts of equity daily give relief where the remedy at law is extinguished. The three makers of this note, as to this transaction, are considered in the light of partners, and the consideration received by them was for the mutual benefit of them all; and although this consideration, whatever it might be, may survive, unless severed during the life-time of the intestate, yet the survivors are considered, in equity, as the trustees for the representatives of the deceased, for his proportion. Rights claimed by, and injuries arising from, survivorship, are not viewed in a very favourable aspect, either at law or in equity. I have looked into the cases referred to by the appellants' counsel, which I think fully establish and warrant both the right and practice of courts of equity, giving relief in cases of this description. The survivors are insolvent. The deceased left assets sufficient to pay this and all other just demands against his estate. The appellants are without remedy at law, and I see no reason why equity should not give relief. I am, therefore, of opinion, that the decree of his Honour the Chancellor ought to be reversed.

FINIS.

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